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Supreme Court of the United States

OCTOBER TERM, 1963

No. 9

CHARLES F. BARR, ET AL., PETITIONERS,

vs.

CITY OF COLUMBIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 7, 1962
CERTIORARI GRANTED JUNE 10, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

Statement

Appellants Charles F. Barr, Richard M. Counts, David Carter, Milton B. Greene and Johnny M. Clark, all Negro college students then attending college in the City of Columbia, South Carolina, were arrested on the 15th day of March, 1960 and charged with the offenses of Trespass and Breach of the Peace. Appellants were tried before Columbia Recorder John L. Rice, without a jury, on the 30th day of March, 1960. Each appellant, at the conclusion of all evidence, was found "Guilty" by the Recorder on each charge and each was sentenced to pay a fine of One Hundred ($100.00) Dollars on each charge, or serve a period of thirty (30) days in jail on each charge, provided that Twenty-four and 50/100 ($24.50) Dollars was suspended on each charge.

Within the time specified by law, Notice of Intention to Appeal was duly served on the Recorder, each appellant having deposited cash bonds. Subsequently, proper appeal bonds with sufficient sureties were substituted in lieu of the cash deposits.

Thereafter, by consent, this case was consolidated with a similar appeal from the Columbia Recorder's Court and argued before Honorable John W. Crews, Judge of the Richland County Court (Criminal Division). By Order dated April 28, 1961, Judge Crews affirmed the judgment of the Recorder's Court.

Notice of Intention to Appeal was timely served upon the City Attorney.

[fol. 2]

IN THE

RECORDER'S COURT OF THE CITY OF COLUMBIA

STATE OF SOUTH CAROLINA

THE CITY OF COLUMBIA, Plaintiff,

vs.

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK.

Transcript of Trial Proceedings—March 30, 1960

The Court: Jenkins, how do the defendants plead?

Mr. Jenkins: They plead "Not Guilty", your Honor.

Mr. Jenkins: If your Honor please, I would like to say at the outset that Mr. W. Newton Pough, of the Orangeburg Bar, is associated with me in these cases.

The Court: That is perfectly agreeable.

Mr. CARL D. STOKES, being duly sworn, testifies as follows:

Direct examination.

By Mr. Sholenberger:

Q. I believe your name is Carl D. Stokes?

A. Yes.

Q. Now, Mr. Stokes, you are a member of the South Carolina Law Enforcement Division?

A. Yes, sir.

Q. Commonly known as SLED?

A. Yes, sir.

Q. How long have you been with that department?

A. I was commissioned in 1956.

Q. Had you had any prior police experience?

A. I worked with SLED while attending the University.

Q. As a result of your connection with SLED, were you at the Taylor Street Pharmacy in the County of Richland,

State of South Carolina and the City of Columbia, on the 15th day of March, some time during the day?

A. I was, sir.

Q. What time of the day was it?

A. We went down about 10:30 I believe, in the morning.

[fol. 3] Q. All right, sir, why were you there?

A. Well, the first part of the morning when I went to work at Headquarters, I was informed by Chief Strom to come to Police Headquarters and assist them in anything that they needed our assistance.

Q. Had you had information that there might be something occurring at the store?

A. Well, I didn't have information. I came down and met with the police officers and was assigned to work with Detective Cannon and Deputy Sheriff Mustard.

Q. That's a County Sheriff?

A. Richland County Sheriff. We were informed then that something may occur at the Taylor Street Pharmacy and we were assigned to work at the Taylor Street Pharmacy, and that's the reason we were there.

Q. All right, Mr. Stokes, while you were there, please tell this Court just what took place in regard to these five defendants who have plead "Not Guilty"?

A. Approximately 12:35 the defendants, all five of them, came into the Taylor Street Pharmacy. Deputy Sheriff Mustard and myself were inside. I believe a couple of them stopped at the card counter and the others proceeded on back and eventually all five of them went back to the counter and sat down. The luncheon counter.

Q. Did they sit on stools?

A. Well, the counters are in a half moon shape, or similar to what we have here, and they sat at the counter. On the stools at the counter. Four of them sat at the first counter and one I believe, went over to the second counter.

[fol. 4] Q. All right, sir, were there any other people sitting at the counter?

A. Yes, there were other customers there eating.

Q. What took place then?

A. Whenever they sat down, the owner, Mr. Terry, came back and at the entrance of the lunch counter, it is partitioned off from the rest of the store. Well, at the entrance

of the lunch counter he made the statement to the five, that he wasn't going to serve them, that they would have to leave. I requested Mr. Terry—

Q. Just a minute. After he requested them to leave, did they get up and leave?

A. No, sir, they never turned around. They just sat there at the counter.

Q. In other words, they didn't pay any attention to his request?

A. They didn't do anything.

Q. What happened then?

A. I requested that Mr. Terry go to each individual and ask him to leave, in my presence, and he went to each one and asked him to leave, that he wasn't going to serve them. Each one turned and looked at him but they never said anything, and after he had told all five of them, he turned and started out back from the luncheon portion of the store.

Q. After he had asked each one individually, did any of them attempt to leave?

A. No, sir.

Q. All right, go ahead?

A. When he started out of the luncheonette, I believe Carter got up, stood up and asked Mr. Terry if he could ask him a question. Mr. Terry said that he had no comment [fol. 5] to make, that they would have to leave.

Q. That was the third time then that at least he asked Carter to leave?

A. Yes. Whenever Carter stood up to ask a question, he took a couple steps and he stopped and the other four stood up as though they were going to follow Carter out. Carter then turned around and motioned for them to sit back down and they sat back down and sat there. I might add too that they had books, some type of books.

Q. What did you do then?

A. Well, I gave them, I couldn't say exactly how long, but several minutes, after Mr. Terry had left the section, to see what they were going to do and they just sat there. The customers began to stand up and leave their dinners on the counter, so I went back—there were two on one

corner and one on the other corner of the second booth. I walked in the middle of those and told them, I believe the words I used, that I was a State officer and they had been asked to leave and they didn't so they were under arrest. That's when they got up and followed us out.

Q. Did you bring them down here to headquarters?

A. They followed Deputy Sheriff Mustard to the front of the store where three of them were placed in one police car and two in the other, because we didn't have room for all five of them in one car, and we brought them to police headquarters.

Q. Do you know anything else about this case?

A. That's all I know about it.

By the Court:

Q. That happened in Richland County, South Carolina?

[fol. 6] A. Yes, sir.

Mr. Sholenberger: I asked him that to begin with.

Cross examination.

By Mr. Jenkins:

Q. You are Mr. Stokes?

A. Stokes.

Q. Now this occurrence that we are concerned with today, took place on March 15th?

A. March 15th.

Q. Now you have testified, Mr. Stokes, that you were at the Taylor Street Pharmacy on March 15th?

A. Right.

Q. In an official capacity?

A. Right.

Q. Now would you state to the Court your reason for being there?

A. As I stated before, I had orders from my Chief to come to police headquarters and assist the police department, not only myself but other officers from my department. We met here with them and upon information they had. I was assigned to work with Detective Cannon and Deputy Sheriff Mustard at the Taylor Street Pharmacy.

Q. I believe you testified on direct examination that you were informed, I believe that's the word you used, that something would happen at Taylor Street Pharmacy?

A. We were told at the meeting, yes, sir.

Q. Would you tell the Court what was your information as to what was to occur?

A. They told us a sit-down demonstration was to occur at the Taylor Street Pharmacy.

[fol. 7] Q. And were you assigned there to prevent the sit-down demonstration?

A. I was there to prevent any violence that might come from the sit-down demonstration, from either race, whether it be White or Colored.

Q. I didn't hear the last part?

A. To prevent any violence at all that might occur from this sit-down.

Q. Is that your only reason for being there?

A. That was the reason we were assigned there.

Q. Did you have any other reason for being there other than to prevent some violence which may occur?

A. Other than Chief Strom informed me to come down here, or ordered me to come down here and assist the police department.

Q. Now you were in the store when these five defendants came in?

A. I was.

Q. Taylor Street Pharmacy is a very popular store. Is that correct?

A. I don't know how popular. It's open 24 hours a day.

Q. I believe its radio program advertises that. Have you ever heard it?

A. I don't know if they have a radio program but I think they advertise a good bit.

Q. Now you were there when these five defendants came in?

A. I was.

Q. Did they come in in a group or separately?

A. They came in single file. In fact, there is a door—one door leads into the store and one leads out of the store, more or less from the cash register counter, and

I couldn't say all of them but several of them went through [fol. 8] what I would call the exit door, to enter the store.

Q. You observed the manner and demeanor of these defendants?

A. I was trying to observe everybody.

Q. Were they orderly when they came in?

A. Oh, yes, they were orderly.

Q. They created no disturbance of any kind?

A. No disturbance at that time.

Q. Now were there other customers in the store at that time?

A. There were.

Q. A large number or one or two?

A. Do you mean in the whole store?

Q. The whole store?

A. It's a pretty large store. There were customers but I don't know exactly how many. There were several eating in the lunch part and several in the other parts.

Q. What part of the store were you stationed in when these defendants came in?

A. I was up at the front part of the store.

Q. At that time could you see from the front of the store, to the lunch department?

A. I could see the partition which comes up to about my shoulders, I could see that part, and I could see in the back of the store.

Q. Now when these defendants came into the store, did they in any manner interfere with any of the other customers in the store?

A. How do you mean by interfere?

Q. Did you observe them interfering physically?

A. No, they went in and sat down. That's all they did.

[fol. 9] Q. When they first went in the store, we haven't reached the part when they were in the lunch department?

A. They walked in, and as I stated before, I believe a couple of them stopped at the card counter where you buy birthday cards, etc.

Q. Did the entrance of these defendants into the store, arouse any particular concern or interest on the part of the customers there?

A. When they first entered the store? No.

Q. Nobody paid them any particular attention?

A. Not that I could tell.

Q. So it didn't seem out of the ordinary that the defendants would enter the store?

A. No.

Q. Now you said that shortly after entering the store, they proceeded to the lunch department?

A. They proceeded back to the luncheonette.

Q. Were there any other people in the lunch room department of the Taylor Street Pharmacy when these defendants came in?

A. There were.

Q. Do you know whether there were several or a large number?

A. There were several. At the first counter I believe maybe five and the other counter was approximately the same amount. I didn't count how many there were, but there were a few empty seats. I'll put it that way.

Q. I am not familiar with the lunch room department of the Taylor Street Pharmacy but I believe you said there was crescent shaped counter?

[fol. 10] A. There were three crescent shaped counters similar to what we have here. The waitress would go in between the middle portion to take orders.

Q. Do you know approximately how many stools there are?

A. I don't know how many.

Q. When these defendants came in on March 15th and proceeded to the lunch room department, there were vacant stools were there?

A. Yes.

Q. These defendants seated themselves on the stools?

A. Say this is the first counter, one sat here and one up there and I believe two over here and on the second counter one sat by himself.

Q. Did they all sit down simultaneously, or some sat down and others were standing?

A. One came to this one, one to that one and the other one walked around.

Q. Do you remember whether any of them had to look around to see if there were any vacant stools?

A. As well as I remember, they walked in to the entrance of the luncheonette section similar to the aisle here. They walked straight in the aisle and one came to this side and the others went over that way. They didn't hunt for a seat.

Q. Did they place any order for food while sitting there?

A. No, they did not.

Q. Did anyone approach them to your knowledge, to inquire as to whether they wanted to place an order for food?

A. Not to my knowledge. Before they came in, the manager or the owner, Mr. Terry, had told me that he [fol. 11] wasn't going to serve them and that he wanted them out of his store, if they came back.

Q. That was prior to the defendants ever getting there?

A. That was prior to their entering.

Q. So then one of your purposes in being at the Taylor Street Pharmacy was to prevent these people from seeking service?

A. No.

Q. Well, what effect did the information given you by Mr. Terry, have on you?

A. It gave me; I wouldn't say a reason, but it more or less gave me something to look out for. If they were to come back, then I could look out for maybe someone else interfering and causing some violence. He had informed us that if they came, he wasn't going to serve them.

Q. Did Mr. Terry give you the impression that he expected some violence to occur if they came in?

A. I didn't come to any conclusion or observe any impressions that he had.

Q. When these defendants sat at the counter, did they sit there as ordinary customers would sit?

A. Well, I don't think an ordinary customer would come in and place their books up where a plate would be or where you would be eating dinner from, and leave it there.

Q. Mr. Stokes, during the time you were in school, certainly you carried books with you sometimes?

A. Sure.

Q. Did you ever carry books into the cafeteria or lunch-room?

A. If I did, I would leave them at the door.

[fol. 12] Q. I mean, with reference to you?

A. Excuse me, speaking of myself, or my hat, I wouldn't carry them to the counter, I would leave them in the car or if I was walking I certainly wouldn't place them on the counter. If I had to take them to the counter, I would place them on the floor beside me.

Q. It is quite possible however, that these defendants may have wanted to preserve their books much more so than you wanted to preserve yours. That's possible, isn't it?

A. Oh, yes, it's possible.

Q. So that they may not have just wanted to throw their books down on the floor?

A. I wouldn't throw mine either.

Q. At the lunch counter, were there any provisions for putting books and other packages which a customer may have?

A. I didn't observe the structure of the counter.

Q. It is not so unusual that if a person came in to a lunch counter and had his books with him, it is not so unusual that he would place them on the counter is it?

A. Well, I don't know what is usual or unusual but to me, if I were sitting by someone else who is eating, it certainly wouldn't be proper for me to place my books beside them eating, where I would expect to be served.

Q. Did they place their books in front of them or scatter them all over the counter?

A. Their books were placed—

The Court: Counsel, I would like to make this observation. You are going rather far afield. I want to stick to the issue involved in the case but I don't want to shut off any pertinent testimony, but at the same time I don't want [fol. 13] to go into matters that are irrelevant and not germane to the issue. Whether they put their books on the floor or on the table, I don't think has a thing to do with it frankly.

Mr. Jenkins: I believe, if your Honor please, it started off trying to find out from this witness whether the de-

meanor of these defendants, when they entered the lunch-room, was any different from that of any other customer.

The Court: But he testified that their demeanor was not any different from any of the others.

Mr. Jenkins: He testified, if your Honor please, that they put their books on the counter, and to him that seemed a bit unusual, so I was merely trying to find out whether that was the ordinary thing that students with books would do when they entered.

The Court: I think he's testified enough about the books.

Q. There were other customers in the lunch room when these defendants came in?

A. There were.

Q. Were they White or Negro?

A. They were White.

Q. These defendants of course are Negroes?

A. Right.

Q. Now these defendants seated themselves at the lunch counter, and did they sit by any persons other than themselves?

A. If I remember correctly, the one that came to this side sat between—sat by a White lady. The one that sat at the other counter sat between two men. The other two sat at two empty seats together, with a White man on each side of them.

[fol. 14] Q. Do you recall what those other customers were doing when these defendants came in?

A. They were eating. The White lady had a plate in front of her and the others were eating. When they sat down, the White lady and a couple men on this side stood up and left their plates.

Q. Are you certain now that they just stood up immediately when these defendants came in?

A. Yes. I don't say when they came in but when they sat down.

Q. Did you see anyone directing either of these persons to stand up?

A. Which persons?

Q. These other customers that stood up when these defendants came in?

A. Did I see anyone directing them to stand up?

Q. Yes?

A. No.

Q. You are certain now with reference to the lady, that no one invited her to move?

A. No. I mean, when they sat down, she jumped up, or stood up.

Q. Now the other customers who were seated there, they continued to sit?

A. Some of them.

Q. Some got up and some continued to sit?

A. Yes.

Q. To some, it didn't seem any undue occurrence, that these defendants came in and sat down to eat?

A. I don't know about that.

Q. Now you testified that some person from the store, I believe Mr. Terry, came over and said what to these defendants?

[fol. 15] A. He stood at the entrance to the luncheonette and told them that they would have to leave, that he wasn't going to serve them.

Q. About how long had they been there when he told them that?

A. They had come in and had been seated.

Q. Mr. Terry didn't say anything to them prior to their sitting down?

A. No.

Q. Now in the beginning, you had been at the front of the store when these defendants came in. Did you just follow them on to the back?

A. Since I was in the store, I had been wandering around by myself looking at different articles on the counter, and observing different people.

Q. I mean, from the time these defendants came in, I believe you testified you were at the front of the store?

A. I was at the front of the store.

Q. So you just followed them on back to the lunch counter?

A. I wouldn't say I followed them but I walked on back.

Q. Not very long after they got there?

A. Right.

Q. Now then, they were asked to leave by Mr. Terry and they refused to leave?

A. That's right.

Q. Did he give them any reason for refusing to serve them?

A. I don't recall whether he gave them a reason. All I remember him saying to each one of them, that he wasn't going to serve them and they would have to leave. The [fol. 16] reason for him telling them to leave I reckon was because he wasn't going to serve them.

Q. I merely asked you whether or not you heard him give them a reason?

A. Well, the reason I think that he asked them to leave was because he wasn't going to serve them. I mean, that's what I heard. Not what I think but that's what I heard.

Q. Of course I didn't ask you what you think about it. I merely asked you did you hear him?

A. That's the reason I say it's not what I think, it's what I heard.

Q. What were you doing during that time while Mr. Terry was talking to these defendants?

A. He first made the statement to all of them in a group.

Q. You were doing what then?

A. I was standing by him. I had come up by him.

Q. Was your purpose in standing by him to assist him in refusing service to these defendants?

A. No, I was there to prevent violence.

Q. Up to that point was there any indication of violence?

A. No.

Q. As a matter of fact, throughout the entire incident was there any indication of violence?

A. The only incident that I figured violence might come from was when they sat down and the customers stood up, and I didn't know what was going to come off. I couldn't read their minds or anyone else's in fact.

Q. Did the customers stand in a threatening manner or just stood up as though they didn't want to sit by these persons?

[fol. 17] A. I wouldn't know exactly how to interpret the standing up, in a threatening manner.

Q. Well, we are not going to be too technical about the word threat, but did they just stand up in an ordinary manner?

A. Some word like threat could mean a lot.

Q. Now then, since we seem to have some question about the meaning of words and attitudes and things of that sort, you were there to prevent violence?

A. I was there to prevent violence, was my main purpose.

Q. Would you know what violence means?

A. When someone would maybe hinder someone else. Violence could be interpreted as fighting.

Q. Would a threatening manner tend to lead toward violence?

A. I would think so.

Q. Now the manner in which these persons stood up, would that manner in your opinion tend to lead toward violence?

A. As I stated before, when they sat down and the others stood up, the word you used before was simultaneous, that would apply in this case.

Q. Did they stand up or leave the area?

A. They stood up and the one on this side backed up to the wall. The others got in the corner.

Q. I asked you this before but I'll ask you again. Throughout the entire incident, there was in fact no violence, was there?

A. No violence.

Q. And there was no threat of violence was there?

A. No, other than maybe when they stood up. I didn't want anything to happen.

[fol. 18] Q. So, as it worked out, except for your assisting the manager in arresting these persons, you need not have been there. Is that true?

The Court: I don't think that's germane. He's testified why he was there, under orders of his superior and I think that's sufficient on that.

Q. You, after Mr. Terry had told the group to leave, suggested to him that he tell each one individually?

A. Right.

Q. State your reason for doing so?

A. Why I asked him to have them leave?

Q. Yes?

A. As I stated before, he had informed me that he wasn't going to serve them and that he wanted them out of his store. All right, after he had made the statement to all of them, they sat there like maybe they didn't hear him. The others had started to get up, the White customers stood up, and the reason I asked to tell them again so that they would know that he wasn't going to serve them and wanted them to leave.

Q. In fact, you were assisting him in refusing them service and asking them to leave?

A. I wouldn't say I was assisting him.

Q. What was your point in being certain that they heard him?

A. So that whenever they didn't leave and they had been asked to leave, well I heard him ask them to leave and they ignored him. He's the owner of the store and as I said, my purpose was there to prevent violence, but at that particular point they refused to leave and it seemed to me another law was being broken.

Q. What was that law?

A. They were trespassing.

[fol. 19] Q. Are you familiar with the trespass law?

A. No, I don't say I'm all familiar with it.

Q. It was an ever present factor in your mind that day?

A. I wouldn't say it was ever present. I tried to keep all the laws. I don't say all of them but I try to keep most of them in my mind.

Q. You did however, assist the manager in refusing service to these defendants, didn't you?

A. I won't say I assisted him in refusing service.

Q. You assisted him in evicting them from his premises?

A. As it turned out, I did.

Q. And you made the charges against them did you?

A. The warrant charges them with trespass and breach of the peace.

The Court: Let me ask counsel to try to be a little more brief. I want everybody to be heard but at the same time I don't want to draw this out too long. There are a good many other witnesses, both on behalf of the prosecution and

the defense and I just don't want to draw it out too long, so make it brief and to the point.

Q. Mr. Terry, did he request that you arrest these defendants?

A. No.

Q. Did he request that you evict them from his premises?

A. You mean at that time?

Q. At any time?

A. No. He did state before that he didn't want them in his store.

[fol. 20] Q. And did he go further and say: "If they come in my store, I want you to arrest them" or words to that effect?

A. No, I won't say he said that.

Redirect examination.

By Mr. Sholenberger:

Q. In other words, you went there for the purpose of preventing something which you didn't know for sure what might happen?

A. That's correct.

Q. You didn't know what might happen under these circumstances?

A. No, I didn't.

Q. That's why you were there as a Peace Officer for the State of South Carolina?

A. Yes, sir.

Mr. JOHN M. TERRY, being duly sworn, testifies as follows:

Direct examination.

By Mr. Sholenberger:

Q. Mr. Terry, you are the owner of the Taylor Street Pharmacy in the City of Columbia, are you not?

A. I am a Co-Owner.

Q. You actually manage the place?

A. Yes, sir.

Q. All right, sir, on March 15, 1960, did you have occasion to see these five defendants in your place of business?

A. Yes, sir.

Q. Just go ahead and tell the Court what they did when they came in your store. Did you see them when they came in?

A. Yes.

[fol. 21] Q. What did they do when they came in?

A. Well, just the same testimony as Mr. Stokes gave, they went back to the lunch department, through the store and back to the lunch department. Four of them sat at the first counter and one at the second counter, and I went back and asked them, or told them I would not serve them and asked them to leave, and Mr. Stokes then requested that I ask each one individually, which I did, all but one, and the luncheonette manager asked him and they refused to leave, and I left the department, with the law enforcement officers there.

Q. Do you recall David Carter coming up to you and making a request?

A. He got up and started towards me, and said "Sir, could I ask you a question", and I directed the luncheonette manager, Mr. Cothran, to tell them to leave.

Q. You say he left the lunch department?

A. He left the lunch department and started toward the front, and I left the law enforcement officers to enforce the law.

Q. Had you informed Mr. Stokes prior to the defendants coming in, that you were not going to serve them, and that you wanted them to leave?

A. That's correct. I was informed on Monday that they would be there at 12:35 Tuesday, under their plans, etc.

Q. In other words, Mr. Terry, you didn't know what might happen?

A. That's correct.

Q. Mr. Terry, is it or is it not your policy to serve food to persons of the Negro Race?

A. We do not serve Negroes at our lunch department.

[fol. 22] Q. Has that been your policy?

A. That's been the store policy.

Cross examination.

By Mr. Jenkins:

Q. Mr. Terry, how long have you operated the Taylor Street Pharmacy?

A. At the present location or across the street?

Q. Your present location?

A. It will soon be four years.

Q. Prior to that you operated across the street how long?

A. Approximately six years.

Q. The Taylor Street Pharmacy advertises itself as being a complete department store, or something to that effect?

A. That's correct.

Q. You have many departments?

A. That's correct.

Q. Including a lunch room department?

A. That is a separate department, yes.

Q. It's one of the departments in your store?

A. It is a separate department in our store.

Q. When you say separate, would the drug department be a separate department?

A. Well, the reason I mention separate department, we have two City licenses at Taylor Street Pharmacy, the luncheonette is one and the front area is another.

Q. That clarifies it. You in the operation of your store, cater to the public generally don't you?

A. That's correct.

Q. Irrespective of race?

A. In the front area, that's correct, the Taylor Street Pharmacy department.

[fol. 23] Q. Now tell me what you mean when you qualify your answer by saying you cater to the public generally in the front area irrespective of race?

A. I just explained to you we have two city licenses. We have the Taylor Street Pharmacy license to operate and we have the Taylor Street Pharmacy luncheonette license to operate.

Q. And you call the entire area other than the luncheonette, the front area?

A. The front area of the store, yes, sir. That includes everything other than the luncheonette.

Q. These defendants are Negroes aren't they?

A. I would think so. They look like it to me.

Q. What we generally accept as Negroes?

A. Yes.

Q. Do you have Negroes trading in your store?

A. Yes.

Q. One or two, or in large numbers?

A. I think quite large numbers.

Q. So quite a bit of the income from your store comes from Negroes?

A. Quite a bit.

Q. You don't hesitate to give them service do you?

A. In the front area, definitely not.

Q. As a matter of fact, you invite them in don't you?

A. That's correct.

Q. Just like any other member of the public, you invite them in?

A. That's correct.

Q. You don't invite them into the luncheon area. I mean Negroes?

A. We do not.

Q. Under any circumstances?

[fol. 24] A. If they request it, we will fix an order to go for them, at their request.

Q. So Negroes can then come into the back area, I guess I'll call it, the luncheon area, and receive food service?

A. Food service to go.

Q. Do any of them make such requests?

A. Some.

Q. Large numbers or just scattered?

A. I think it would be very minute.

Q. Do you ever recall seeing any of these defendants, other than on March 15th, 1960, order any food from the lunch counter?

A. No, I haven't. I mean, I don't recall seeing them because I'm not there all the time. I don't remember them.

Q. Is there any public notice given by you that you do not serve Negroes generally in the luncheon department?

A. I beg your pardon?

Q. You say you do not serve Negroes generally in the lunch department?

A. That's right.

Q. Other than they may come in and order food to take out, you do not serve them?

A. That's correct.

Q. That's the policy of your store?

A. I have Negroes on my payroll in the kitchen department.

Q. I'm talking about customers. Now then you testified that your policy is with reference to the food service, not to serve Negroes other than they may purchase food to take out?

A. If they request it, we will fix it for them.

[fol. 25] Q. Now I ask you, is there any public notice provided by you that you do not serve Negroes in the lunch counter, other than they may purchase food and take it out?

A. I never have advertised in any way on the lunch department.

Q. So there is no public notice then that you do not serve them?

A. I have the public notice that I can refuse to serve anyone in that department.

Q. You do have a public notice to that effect?

A. It's a sign there.

Q. You do have occasion to refuse to serve people other than these defendants?

A. Definitely.

Q. For your own personal reasons?

A. I don't think my personal reasons are involved in this case, are they?

The Court: No, that's correct.

A. But for business reasons or personal or any way you put it, I feel that I have a right to refuse to serve anyone.

Q. That's what I asked you. There's no argument about that. Now on March 15, 1960, you testified that you knew that these defendants or some others would come into your store?

A. I didn't know that. I was informed on Monday,

that a demonstration was planned for the Taylor Street Pharmacy at 12:35. Didn't say what date.

Q. Based upon your information you then asked the assistance of the police department and other police officers?

A. That's correct.

[fol. 26] Q. And the police officers who were in your store on March 15, 1960, were there at your request?

A. Well, I would say yes or no. I mean they came and informed me of the demonstration and we were working as a group. I'll put it that way. I didn't call them to come around and inform me. They informed me in advance.

Q. When you say working together, you requested their assistance in preventing this demonstration?

A. Not necessarily a demonstration. Any type of violence could erupt or anything, against my store policy. It could create violence.

Q. Anything against your store policy, you then wished the officers to assist you in preventing?

A. That's correct.

Q. So you then requested their assistance?

A. I would put it that way, yes. I wanted them there. Let's put it that way.

Q. And did you observe these defendants when they came into your store?

A. Yes.

Q. Did any of them make a purchase in the store?

A. Not to my knowledge at that time.

Q. You were some place near the lunch counter when they came in?

A. I was up in the front area.

Q. But you saw them when they went to the lunch counter?

A. Correct.

Q. And you immediately came back?

A. That's right.

Q. Did you see them when they took seats?

[fol. 27] A. Well, immediately after. I was following them back there through the aisleway and I immediately proceeded on back.

Q. Did they physically interfere with anyone on the way to the lunch counter?

A. Not to my knowledge.

Q. After they reached the lunch counter did they physically interfere with anyone?

A. Not to my knowledge.

Q. They were generally orderly?

A. That's correct.

Q. Were they neatly dressed?

A. I would think so.

Q. Their appearance then was generally that of any customers, other than the color of their skin?

A. That's right. They were carrying books.

Q. The seats that they took were vacant? There was nobody on the seats that they took?

A. That's correct.

Q. They didn't interfere with anybody that way?

A. That's correct.

Q. Did they order any food while in your store?

A. No, they didn't.

Q. Did anybody approach them to ask for an order?

A. No, they didn't.

Q. How long after they sat down did you come up and request them to leave?

A. Very briefly.

Q. So they really didn't have time to order, did they?

A. I didn't give them time actually because I wasn't going to serve them.

Q. Suppose they had stood up when you requested them, and then requested food to take out, would you have served them?

[fol. 28] A. If they had moved on to the side without creating any disturbance, which they had already created. If they had demonstrated, I would not have, if they came in there for the express purpose of demonstrating, which I feel sure they did.

Q. I'm trying to get your answer to my question?

A. I don't think I would have. Not these five, no.

Q. You wouldn't have served them?

A. No, or anyone else who comes down there and causes a disturbance.

Q. But any other Negroes coming in there and walking up and ordering food to take out, you would serve them?

A. If they request it I will fix an order to go, yes.

Q. Now your only reason for refusing them service was the fact that they sat down. Is that right?

A. Well, we've been through that already.

The Court: We won't have any demonstrations in the courtroom. (Some commotion in the rear of the courtroom.) I think he has answered that, counsel.

Mr. Jenkins: If your Honor please, I don't know the answer he gave.

A. What was your question again, please?

(Question read.)

A. That's correct.

Q. That and the fact that they were Negroes?

A. That's correct.

Q. Now Mr. Terry, after they sat down and refused to move, did you request any police officer to arrest them?

A. After they sat down.

Q. You told them to move and they refused, did you ask them then to arrest them?

[fol. 29] A. We had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing.

Q. You had already agreed with the Police Department—

A. If we had a demonstration, if we requested them to leave and they refused, then they would be arrested.

Q. So in fact you had instructed the Police Department to arrest them if they refused to leave at your request?

A. Not necessarily, I had instructed them but that was an agreement pertaining to the law enforcement division.

Q. You let the police department know that that was your wish?

A. That I would not serve them.

Q. And if they did not leave when you asked them, you wanted them arrested?

A. That's correct.

Q. Other than the fact that they came in and sat at the lunch counter, they created no other disturbance did they?

A. When they sat down they created a disturbance, yes. You could have heard a pin drop in there, especially two

weeks before that or whatever time before that, a large number came in, it just completely stopped everything.

Q. Did you notice the behaviour of any other customers who were seated at the lunch counter when these defendants came in and took seats?

A. I think everyone was on pins and needles, more or less, for fear it could possibly lead to violence.

[fol. 30] Q. I have in mind the fact, did you observe them continue to eat or get up and leave, or just what did you observe the other customers doing?

A. Just a brief observation, I think a couple of them got up and left their food on their tables, and the rest were just watching to see what was going to happen.

Q. They didn't move. They sat where they were?

A. That's correct. Some of them moved, yes.

Q. Did you request any of the other customers to move?

A. No, I did not.

Q. To your knowledge, did anyone else employed by the store, request any of the customers to move?

A. No, not to my knowledge.

Q. Was it your idea to have these defendants arrested, or was it the idea of the police department?

A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested.

The State rests.

The Court: Is there any testimony on behalf of the Defendants?

Mr. Jenkins: Yes, your Honor, if you will indulge me for just a minute.

Mr. David Carter, being duly sworn, testifies as follows:

Direct examination.

By Mr. Jenkins:

Q. You are David Carter, one of the defendants in this case?

A. That's correct.

[fol. 31] Q. You are one of those persons who on March 15th, 1960, went into the Taylor Street Pharmacy?

A. Correct.

Q. In Columbia, South Carolina?

A. Right.

Q. In your own words, please relate to the Court what took place on that day?

A. On March 15th, around 12:35, five of us entered the Taylor Street Pharmacy. As we entered the store, I glanced to my left and I saw the Deputy standing on the side of the store. As we started toward the back, I saw Mr. Stokes coming from the back. They stopped and looked at some cards. We moved on to the back of the store, to the luncheonette section.

Q. May I interrupt you just a minute. What was your purpose in going into the Taylor Street Pharmacy that day?

A. The purpose of going into Taylor Street Pharmacy that day was to be served.

Q. When you say "served"—

A. Served food. Being a part of the general public we felt we had a right there, and we still feel we have a right there.

Q. Did you have in mind making any purchases other than food?

A. Not that particular time, no.

Q. Had you been in Taylor Street Pharmacy previous to this?

A. Yes, I have.

Q. Made purchases there?

A. I've made several purchases there, plus I had checks cashed there.

Q. Have you ever made any purchases of food there?

[fol. 32] A. No, I never purchased food there.

Q. Go ahead with your account?

A. As I said, I saw Mr. Stokes coming from the back, I moved on to the back and immediately I took a seat at the lunch counter beside a White lady. At that particular time, I called him the Cashier, it could have been the luncheonette manager, came to the lady and said: "Get up, we'll get them out of here."

Q. May I interrupt you? Is it your testimony that an employee of the store came up to the person sitting there and made a statement to them?

A. That's my testimony, said to the lady: "Get up, we'll get them out of here", so he caught the lady by the hand and assisted her in getting up.

Q. Prior to that time had this lady made any indication that she would get up?

A. The lady made no indication at all. She sat there and began eating just as if I was a human being sitting beside her, which I was.

Q. Now will you continue?

A. Then about that time the Deputy Sheriff, I think it's the Deputy. Am I right? The Deputy Sheriff came back and he stood beside this luncheonette manager, not Mr. Terry, and he said to me—the luncheonette manager said to me: "You might as well leave because I ain't going to serve you".

Q. Did you leave?

A. No I didn't because he didn't ask me to leave. He said: "You might as well leave because I'm not going to serve you."

Q. Suppose he had asked you to leave, would you have left?

A. Had he asked me to leave, I would have left and to go on with my testimony, he went to Mr. Counts there and [fol. 33] said the same thing: "You might as well leave because I ain't going to serve you." Then he did not turn to Mr. Stokes but he turned to the Deputy and said: "I've asked them to leave". So then I bowed to Counts and Counts bowed to me and we stood up. Then I said to the luncheonette manager: "Sir, may I ask you a question?" and at that time Mr. Terry said: "No, don't answer him." He said: "No, I don't want to talk to you" so I said: "Thank you, sir" and I turned to walk away. When I turned to walk away I looked back and no one had gone to the other three boys yet, so they were about to leave and I told them to just sit until somebody asked them to leave, and then I turned to walk away and the Deputy patted me on the shoulder and said: "Just a minute please." I said: "Thank you, sir" and I just stood there and waited, and after a while he led me on out and we got in the car and they brought us down to the jail.

Q. Were you told while in the store, that you were under arrest?

A. I was not told that I was under arrest. Mr. Stokes got in the car we were in and he said: "I suppose you boys don't know who I am." Then he pulled out his credentials and said: "I am Mr. Stokes from SLED." I said: "Well, good." I said to him: "It's a very good day isn't it? The weather certainly has changed." He didn't say a word but the other man driving the car said: "Yes it has." They did not tell me that we were under arrest until we got to the jail. However, I knew we were under arrest. I assumed it because they were carrying us down. Yes I did for this reason, when I got in the car and saw the News Reporter, and I called for the News Reporter, and the man who was driving the car, whoever it was, I don't know, I said: [fol. 34] "Who are you talking about? The young man there?" He pointed to Mr. Stokes. I said: "No, not him, I'm talking to Mr. Bill Handle" so he said to Mr. Stokes: "He wants the News Reporter." Mr. Stokes said: "No he doesn't, he wants to go to jail", so I knew then I was under arrest.

Q. Did you observe any conversation between any employee of the Taylor Street Pharmacy and any of the arresting officers up there?

A. At that particular time no, because I don't remember seeing Mr. Terry until I turned to the luncheonette manager and asked him a question. At that particular time he was very emotional and said "No." Whether he conversed with any of the other officers, I don't know.

Cross examination.

By Mr. Sholenberger:

Q. You are David Carter?

A. That's correct.

Q. I believe you stated to your counsel that your purpose for going to the Taylor Street Pharmacy was to sit down at the lunch counter and be served food?

A. Be served food, correct.

Q. And of course it was also your purpose, if you did that and it led to your arrest, why you wanted to be arrested. Is that correct?

A. Oh I wouldn't say I wanted to be arrested. No one wants to be arrested. I wanted to be served.

Q. You went there with the idea that you would be arrested?

A. I went there with the idea of being served. I did not go with the idea of being arrested but I had been promised that I would have equal protection in that store or any other store.

[fol. 35] Q. Who promised you that?

A. The City Manager. There were five of us went down to City Hall.

Q. He promised you?

A. Listen to me now. Five of us went to the City Hall one day to see the Mayor. The Mayor was not in. We then talked with the City Manager, who was very polite to us. He said to us: "Gentlemen, further demonstrations will not be tolerated." We said: "Mr. McNayr, what would you do to stop such demonstrations?" He said to us: "If you are going to go down, I don't object to nobody—"

Mr. Sholenberger: This is all hearsay, your Honor.

The Court: I'm going to strike that out. You see, you have to answer counsel's questions.

A. I'm answering his questions—

The Court: We don't want any speech here. We're not going to tolerate any great big speech.

Mr. Jenkins: Your Honor, I want the record to show that counsel opened the door for this type of testimony.

The Court: He didn't open the door for any hearsay testimony. I'm going to rule hearsay testimony out, definitely. I rule it out right now. Ask him the questions.

By Mr. Sholenberger:

Q. But you did have an idea when you went there, that if you were asked to leave and you didn't leave, that you would be arrested?

A. Well, my intentions were to leave when we were asked properly to leave.

Q. Now, did Mr. Terry, the owner and proprietor of the store, ask you to leave?

A. No, sir, he did not ask us to leave.

Q. Do you deny he asked you to leave?

[fol. 36] A. I certainly deny he asked us to leave.

Q. You deny completely, in the face of his testimony and in the face of the testimony of the officer, that he asked you to leave?

A. I do.

Q. You deny that?

A. That's right.

Q. Well, why did you leave?

A. Why did I leave?

Q. Yes?

A. Because the luncheonette manager said: "You might as well leave, I ain't going to serve you." Then he looked to the Deputy and said: "I've asked them to leave." There was no point in sitting there.

Q. Didn't you leave because the manager told you—the man from SLED told you to leave?

A. The man from SLED did not tell us to leave. As a matter of fact, I did not talk to the man from SLED until after I was in the car, when I called for the News Reporter. The man driving the car said I wanted a News Reporter and he said: "No, he wants to go to jail." That's the first word he said to me.

Q. That's what you went there for, was the intention of—

A. Not to be arrested, to be served.

Q. And you intended to be served even though it might lead to your arrest?

A. No, we wanted to be served, if they were going to serve us. We had nothing to say about being arrested.

Q. Wasn't it your intention to make a case so that you could be arrested?

A. I think I told you I went there to be served and not to be arrested. I think I've told you that.

[fol. 37] Q. Now, after Mr. Terry told all of you to leave,

and the rest of them started to get up, didn't you motion them to get down?

A. Mr. Terry did not tell all of us to leave.

Q. Did you motion them to sit down again after they started to get up?

A. When I started to leave, since nobody went to them, I said just like that. (Indicating with the hand.)

Q. Mr. Terry is correct in that, and also the officer from SLED, that you were motioning them to sit down?

A. That's right, I did that.

Q. Of course this group going there, was the result of a prearranged plan on the part of all of you to go there and sit down and be served. Is that correct?

A. Well, in order to go there it had to be prearranged before we left our place of departure.

Q. In other words it was a prearranged plan of the group?

A. That particular day I went, I invited three men to go along with me to the Taylor Street Pharmacy. To leave the building to go there, it had to be prearranged.

Q. Are you a student?

A. I am.

Q. Where?

A. At Benedict.

Redirect examination.

By Mr. Jenkins:

Q. Assuming, without saying, that you did go to Taylor Street Pharmacy according to some prearranged plan, did you see anything wrong in that?

A. No, I didn't.

[fol. 38] Q. Did you go to Taylor Street Pharmacy as a member of the general public, invited in to do business?

A. I certainly did.

Mr. RICHARD M. COUNTS, being duly sworn, testifies as follows:

Direct examination.

By Mr. Jenkins:

Q. You are Richard M. Counts of Columbia?

A. That's correct.

Q. You are a student at Benedict?

A. That's correct.

Q. What's your classification?

A. Junior.

Q. You are a native Columbian I believe?

A. I am a native Columbian.

Q. Do you remember March 15th, 1960, going into Taylor Street Pharmacy on Taylor Street in Columbia, South Carolina?

A. I do.

Q. State to the Court your reason for going there?

A. Well, I invited a Fraternity Brother of mine, Charles Barr, to come and have lunch with me, and the two of us walked in last, and as we walked in, or before we got to the door, we saw the news man and the police on the outside—

Q. May I interrupt you. What was your reason for going to Taylor Street Pharmacy?

A. To be served food.

Q. You invited I believe, a friend of yours, to have lunch with you?

A. Charles Barr. He and I entered together.

[fol. 39] Q. Now briefly describe to the Court the events that took place in Taylor Street Pharmacy with reference to yourself on that day, March 15th?

A. Well, as I said, when we arrived there we saw the newsmen and the policemen on the outside, so we just ignored them completely because we didn't know why they were there, so we walked on in and as I entered last, the photographer came behind me so I stopped and went over to the cigarette counter and bought a pack of cigarettes and from there I went to the back and as I entered the en-

trance to the lunch counter I imagine it was the luncheonette manager, but it wasn't this gentleman here, Mr. Terry, he extended his arm to me like this (indicating) as if to say he was showing me a seat because as I got there it was very crowded and I didn't see a vacant booth or stool.

Q. When you went into the store you proceeded to the lunch department?

A. After I purchased a pack of cigarettes.

Q. You purchased the cigarettes first?

A. That's right.

Q. Where was Barr at this time?

A. I don't know. I think he had walked ahead of me.

Q. That was your companion who had gone with you to get lunch?

A. That's right.

Q. Now did you see these other defendants at that time?

A. Well, when I got to the entrance of the luncheonette counter, they were already seated.

Q. You saw these four?

A. Yes, sir.

[fol. 40] Q. They were seated at the lunch counter?

A. Already seated.

Q. Were there any vacant seats available when you first walked in?

A. There was one but I didn't see it, and so I stopped and looked as if I was looking for a stool, and then the gentleman extended his arm to me and said: "Have a seat here" and I sat there.

Q. You say a gentleman. Was it one of the employees of the store?

A. I would assume so.

Q. Upon what do you base your assumption?

A. Well, right after that he made the statement, after I had been seated, he said: "You may as well leave because we ain't going to serve you", so I thought he had some authority after having gone through all that.

Q. Now, I believe that you testified that when you walked in and looked around for a seat, this employee made a wide sweep of his arm?

A. That's correct.

Q. Was that sweep made in the direction of the vacant stool?

A. It was, and that's where I sat.

Q. You sat on that stool?

A. That's correct.

Q. How long after you were sitting there at the counter, —after you sat at the counter, you testified that this same store employee made some remark to you?

A. That's true.

Q. What was the remark?

A. He said: "You may as well leave, we ain't going to serve you."

[fol. 41] Q. Did you leave then?

A. No, I didn't because that left me a choice to stay or to leave, so I preferred to stay.

Q. Did you order any food while there?

A. Well, the waitress didn't come to take my order.

Q. Had the waitress come would you have ordered food?

A. Yes, sir.

Q. Did any police officer advise you to leave the stool where you were seated?

A. No, they did not.

Q. Why did you leave?

A. Well, the same gentleman whom I spoke of earlier, he came and he practically whispered in my ear the same thing he said before.

Q. What was that?

A. "You may as well leave, we ain't going to serve you", so after having been told twice I looked around at David Carter and he nodded to me as if to say we will leave, so as I stood up I walked to the exit, and then I think it was the Deputy Sheriff whispered in my ear "You're under arrest."

Q. He did tell you you were under arrest?

A. Yes.

Q. Did he tell you for what reason?

A. No.

Q. I don't know whether you testified to this or not but on previous occasions have you been in the Taylor Street Pharmacy?

A. I have.

Q. Have you made purchases there?

A. I have.

Q. Have you made any purchases in the food department of the Taylor Street Pharmacy?

[fol. 42] A. Once that I remember very distinctly when it was. It was during my Probation week, around the first week of May, that's the week I went over to the Fraternity, and I had to go up there one night on an errand and we purchased a sandwich and a soda.

Q. Did you eat that food there at the counter?

A. No, it was to go, because our time was limited.

Q. You took the food with you?

A. Yes.

Q. Did you believe that you had a right to sit at the counter and be served food at the Taylor Street Pharmacy?

A. I did then and I still do.

Q. Did you observe any conversation between any of the officials of the store or employees of the store and any police officer, while you were there on March 15th?

A. Only between the Deputy Sheriff and the luncheonette manager.

Q. Was the conversation you observed between them, before your arrest or after?

A. Well, it was before. It was after he had made the first general statement that "We ain't going to serve you."

Q. And after this conversation, the same officer came and told you you were under arrest?

A. Well, not directly. After the luncheonette manager talked to him, the luncheonette manager came to me again and whispered in my ear: "You may as well leave, we ain't going to serve you." Then I looked at Mr. Carter and he nodded to me and then we got up and then the Deputy Sheriff whispered in my ear: "You're under arrest."

[fol. 43] Cross examination.

By Mr. Sholenberger:

Q. You are Richard M. Counts?

A. That's right.

Q. You say that you never had any conversation with,

or nobody said anything to you except the luncheonette manager?

A. I imagine that's who it was.

Q. Do you recall seeing Mr. Terry?

A. Not at all.

Q. You don't recall seeing him?

A. No, I don't.

Q. In other words, do you deny that he told you to leave the luncheonette?

A. He didn't address me in any way.

Q. Do you remember seeing Mr. Stokes?

A. I do, because he rode in the same car I was in.

Q. You remember him, Mr. Stokes, telling you to leave the luncheonette?

A. Mr. Stokes did not tell me to leave.

Q. He didn't say a word?

A. No, sir, he didn't.

Q. The sum and substance of your testimony is that nobody told you to leave this establishment?

A. With the exception of the gentleman who I mentioned earlier.

Q. The luncheonette manager?

A. I imagine that's who it was.

Q. You say he told you to leave?

A. That's right.

Q. And you didn't leave did you?

A. Because he didn't address me in any direct manner to leave.

[fol. 44] Q. That's the point about having it phrased in so direct a manner.

A. The importance is I assume he had authority there. Had he told me to leave directly, I would have left, but he made it as if I had a choice to stay or leave. He made it clearly understood I wasn't going to be served, therefore I left the second time after he told me.

Q. Wasn't it agreed that this was a planned group to make a test case?

A. No, it was not.

Q. If that was not the case, then why is it that you never had gone to the luncheonette before during your stay in

Columbia, and seated yourself at the luncheonette counter?

A. Well, because as I say—

Q. Why this particular occasion, if there wasn't something behind it?

A. There wasn't any particular occasion.

Q. Why had you not gone there before?

A. That would be the same thing as why I had not gone to another store.

Q. You've been in this store before?

A. I have, on several occasions.

Q. Why didn't you sit down at the lunch counter then?

A. I was rushing on to do something else after I made my purchase.

Q. You say you went there with this group of four boys.

A. Charles Barr and I were walking together, and the other three walked in previously. In fact, if the officers recall, we saw them coming this direction, I can't recall the name of the street, but coming from towards Assembly [fol. 45] Street, and we were coming from the campus direction. We came from opposite directions.

Q. You met there at the same time?

A. They had entered before we had.

Q. How long?

A. I imagine a minute or two.

Q. All right, in addition to your purpose of going there to be served, and that was your purpose, wasn't it?

A. To be served food, yes, sir.

Q. Didn't you also go there for the purpose of being arrested?

A. No, I did not.

Q. You didn't have any idea that you would be arrested?

A. I did not.

Q. You had no idea you would be arrested?

A. I didn't see any reason to be.

Q. I think you testified to your counsel that you looked to David Carter in regard to this thing before you left. Wasn't he the leader of the group?

A. Well, I wouldn't call him the leader of the group. My purpose for looking at him was because he had been told the same thing I had been told.

Q. But you looked to him for leadership?

A. Not really. I just wanted to see what he was going to do.

Q. And why didn't you turn to this boy Barr that you came in with?

A. Well, because Carter was the closest to me.

Q. In other words, you didn't actually sit with the boy you came there with?

[fol. 46] A. Because he walked in ahead of me and there weren't any seats there for me to sit next to him.

Q. But you did go there for the purpose of creating a situation that would likely lead to your arrest?

A. No, I did not.

Q. Do you deny that?

A. I deny it.

Redirect examination.

By Mr. Jenkins:

Q. State whether you went into Taylor Street Pharmacy as a member of the general public invited to trade there?

A. I did.

Q. Now as far as the lunch room area is concerned, did you see any posted notice that you would not be served in that section?

A. I didn't notice any.

Q. How long did you stay in the lunch room section that day?

A. I think it was about five minutes.

Q. There were other persons in the lunch room area, than you and these four defendants?

A. That's right.

Q. Were any of them Negroes, other than you five?

A. No.

Q. Did you see anyone evicted on that day, other than you and these four other defendants?

A. No, I did not.

MOTIONS OF DEFENDANTS TO DISMISS THE CHARGES AGAINST THEM, ETC. AND DENIAL THEREOF

Mr. Jenkins: We have no further testimony, your Honor, but at this time we would like to make certain motions.

The defendants move the Court to dismiss the charges against them and each of them, on the ground that the Court lacks jurisdiction to try these defendants as charged. [fol. 47] The evidence shows that the defendants were arrested and charged by police officers, agents of the State, not for the commission of any crime as charged, or any other for that matter, but in furtherance and in aid of the wishes of private individuals to discriminate against the defendants, based solely on their race and color.

This Court, also an agent of the state, cannot use its authority to aid in the enforcement of a private discrimination based solely on race and color. For this Court to subject the defendants to fine and conviction under the evidence and testimony in this case, would be a violation of due process of law and would deny to the defendants the equal protection of the laws as guaranteed the defendants by the 14th Amendment to the United States Constitution.

The Court: I'll have to overrule that motion on the ground that under the laws of South Carolina and of the United States, I can't grant it.

Mr. Jenkins: The defendants move to dismiss all charges against them and each of them, on the grounds that the evidence shows that the statutes (*i.e.*, S. C. Code, Sec. 16-386, as amended, Trespass, and S. C. Code Sec. 15-909, Breach of Peace) though nondiscriminatory on their faces, are discriminatory when applied to these defendants, thus denying to them due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution and Article 1, Sec. 5 of the Constitution of South Carolina. The grounds for said motion are that the evidence proves,

(1) That said statutes are being used by the police power of the State to aid private individuals in businesses catering to the general public, to discriminate against these defendants solely on the basis of race and color, in violation

[fol. 48] of the 14th Amendment of the United States Constitution;

(2) That said statutes are being used as a basis of unconstitutional State action in that the State police power is provided to eject the defendants from a public place where they have been invited and where they have a legal right to go, and to arrest them and deprive them of their liberty solely on the basis of race and color;

(3) That said statutes are being used as a basis of unconstitutional State action in depriving said defendants of the equal protection of the laws in that they are arbitrarily and unreasonably singled out by being ejected and arrested solely on the basis of their race and color, while others are allowed to remain where the defendants had the legal right to be.

The Court: Motion denied.

Mr. Jenkins: The defendants move for the dismissal of all charges against themselves and each of them, on the ground that the operator of the private business catering to the general public, invited them in and afterwards discriminated against them in the sale and purchase of wares and services solely on the basis of race and color, and that the State, through the use of its police as its agents, cannot become a party to and assist in this unequal treatment. If the State should so assist the private business operator by ejecting and arresting the defendants, the State denies to said defendants the equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

The Court: I'll deny that motion, too.

Mr. Jenkins: Defendants move to dismiss the charges of trespass and breach of the peace, in violation of State Statutes, Section 16-386 and 15-909, on the ground that the [fol. 49] evidence proves that the defendants, as business invitees of a business catering to the general public were merely attempting in a peaceful and lawful manner to exercise the freedom of being served by said business on a nondiscriminatory basis, without regard to race and color, and in so doing were not guilty of any crime.

Further, the defendants move to dismiss the charges of trespass and breach of the peace on the ground that to deprive them of their liberty to enter such a business establishment in a peaceful and lawful manner as the record describes, and be served as others, and that to be ejected and arrested by agents of the State, solely on the basis of race and color, and to be singled out as the only persons ejected and arrested while others remain, is a denial of due process of law and the equal protection of the law as guaranteed by the 14th Amendment of the United States Constitution.

The Court: Motion denied.

Mr. Jenkins: The defendants move for a dismissal of the charge of trespass because of the insufficiency of the evidence to substantiate the charge. The basis of the motion is that even if a private individual in a public business may discriminate against these defendants on the basis of race and color alone (a point which we do not concede), nevertheless, for the State to back up this discrimination by State action in ejecting, arresting and subjecting to trial these defendants, is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States.

The Court: Motion denied.

[fol. 50] Mr. Jenkins: The defendants move for a dismissal of all charges against them for the reason that the evidence fails to show the commission of any of the charges alleged. Instead, the evidence, interpreted most favorably to the State, shows that the said defendants, without violating any rights of the public, were attempting to exercise their common law right of free access to the common market. To be denied that right by the State ejecting them from the business places described in the record, and subjecting them to arrest solely on the basis of race and color is a denial of the equal protection of the laws and due process of law as guaranteed by the 14th Amendment of the United States Constitution and Article 1, Section 5 of the South Carolina Constitution.

The Court: Motion denied.

JUDGMENT

The Court: Now I would like to say this: The law of this State and of the United States is well established, that any private concern or any private individual operating any business, has the right fundamentally and under the Constitution of the United States and of South Carolina, to do business with anybody whomsoever he pleases. That's the fundamental law of this State and of the United States. The witness Mr. Terry, testified that he had a notice posted on the door that he had a right to refuse to serve anybody, whether they are White, Colored or anybody else, if he saw fit to do it, which he had a right to do. Now it's just like a doctor or a lawyer, if a man comes to a doctor's office and wants to be treated, the doctor hasn't got to treat him if he don't want to do it, and neither has a lawyer got to accept a client if he don't want to accept him. That's a fundamental inherent right which an individual has. Now we have a lot of talk about Civil Rights. The [fol. 51] Senate of the United States is today debating the Civil Rights Bill in Washington, but we overlook oftentimes certain property rights and certain inherent rights that an individual has. An individual has rights to do business with anybody he wants to. It's not merely a Colored person or a White person or any other race, but it's a right that if anybody don't want to do business with a person, he don't have to transact business with him. I might mention in passing, that the relationship between the Colored people and the White people of this section has been most harmonious and very cordial for a great many years. It's been very harmonious and very cordial, until some outside interest comes in and tries to create trouble and start trouble, which is a very bad thing, and oftentimes these outside interests are insidious. The Colored race has made great progress down in this part of the country and we can continue to get along well if these outside interests will not come in and try to interfere with our relationship. I'm sick and tired of the Northern politicians playing politics with human rights, and that's what it amount to, the Northern politicians are playing politics with human individual rights which they are making a serious mistake

to do. We can get along well. We can transact our business well as we have done in the past, if we will just keep these outside insidious and selfish interests out. Now I'm not going to quote much law because it's not necessary, but in Second Ruling Case Law, page 559, I'm quoting: "It is a well settled principle that the occupant of any house, store or other building, has a legal right to control it and to admit whom he pleases to enter and to remain there and that he also has the right to expel from the room or building, anyone who abuses the privilege, which has been thus given to him. Therefore, while the entry by one person [fol. 52] on the premises of another, may be lawful by reason of express or implied invitation to enter, his failure to depart on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him." That's the fundamental law of the land and we are going to have to abide by it.

The judgment of the Court is that the defendants are guilty as charged, and they will be fined the sum of $100.00 on each charge, of which amount the sum of $24.50 will be suspended on each charge.

MOTIONS OF DEFENDANTS FOR ARREST OF JUDGMENT, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, ETC. AND DENIAL THEREOF

Mr. Jenkins: Your Honor, at this time, on behalf of the defendants I should like to make certain motions. At this time the defendants move the Court for the Arrest of Judgment, or in the alternative, for a New Trial, on the ground that the Court lacks jurisdiction to try these defendants as charged. The evidence shows that the defendants were arrested and charged by police officers, agents of the State, not for the commission of any crime as charged, or any other for that matter, but in furtherance and in aid of the wishes of private individuals to discriminate against the defendants, based solely on their race and color. This Court, also an agent of the State, cannot use its authority to aid in the enforcement of a private discrimination, based solely on race and color. For this Court to subject the defendants to fine and conviction under the evidence and

testimony in this case, would be a violation of due process of law and would deny to the defendants the equal protection of the laws as guaranteed the defendants by the 14th Amendment to the United States Constitution.

The Court: I'll refuse the motion.

Mr. Jenkins: The defendants move for an Arrest of Judgment or in the alternative, for a New Trial, on the [fol. 53] grounds that the evidence shows that the Statutes (*i.e.*, S. C. Code, Sec. 16-386, as amended, trespass, and S. C. Code, Sec. 15-909, breach of the peace) though non-discriminatory on their faces, are discriminatory when applied to these defendants, thus defying to them due process of law and equal protection of the laws, in violation of the 14th Amendment of the United States Constitution and Article 1, Section 5 of the Constitution of South Carolina.

The grounds for said motion are that the evidence proves:

(1) That said statutes are being used by the police power of the State to aid private individuals and businesses catering to the general public to discriminate against these defendants solely on the basis of race and color, in violation of the 14th Amendment of the United States Constitution;

(2) That said statutes are being used as a basis of unconstitutional State action in that the State police power is provided to eject the defendants from a public place where they have been invited and where they have a legal right to go and to arrest them and deprive them of their liberty solely on the basis of race and color;

(3) That said statutes are being used as a basis of unconstitutional State action in depriving said defendants of the equal protection of the laws, in that they are arbitrarily and unreasonably singled out by being ejected and arrested solely on the basis of their race and color, while others are allowed to remain where the defendants had the legal right to be.

The Court: Motion denied.

Mr. Jenkins: The defendants move for an Arrest of Judgment or in the alternative, for a New Trial, on the ground that the operator of the private business catering

[fol. 54] to the general public, invited them in and afterwards discriminated against them in the sale and purchase of wares and services solely on the basis of race and color, and that the State, through the use of its police as its agents, cannot become a party to and assist in this unequal treatment. If the State should so assist the private business operator by ejecting and arresting the defendants, the State denies to said defendants the equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

The Court: I'll deny that motion.

Mr. Jenkins: The defendants move for an Arrest of Judgment, or in the alternative, for a New Trial, on the ground that the evidence proves that the defendants as business invitees of a business catering to the general public, were merely attempting in a peaceful and lawful manner, to exercise the freedom of being served by said business on a nondiscriminatory basis, without regard to race or color, and in so doing were not guilty of any crime.

Further, the defendants move for an Arrest of Judgment, or in the alternative, for a New Trial, on the ground that the charge of breach of peace and trespass, the charges with which they are being charged here today will deprive them of their liberty to enter such a business establishment in a peaceful and lawful manner as the record describes, and to be served as others, and that to be ejected and arrested by agents of the State, solely on the basis of race and color, and to be singled out as the only persons ejected and arrested while others remain, is a denial of due process of law and the equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution.

[fol. 55] The Court: Motion denied.

Mr. Jenkins: The defendants move for an Arrest of Judgment or in the alternative, for a New Trial, on the ground that the evidence is insufficient to substantiate the charge of trespass. The basis of this motion is that even if the private individual in a public business, may discriminate against these defendants on the basis of race and color alone, a part which we do not concede, nevertheless, for the State to back up this discrimination by State

action in ejecting, arresting and subjecting to trial these defendants, is a denial of due process of law and a denial of the equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States.

The Court: Motion denied, likewise.

Mr. Jenkins: The defendants move for an Arrest of Judgment or in the alternative, for a New Trial, for the reason that the evidence fails to show the commission of any of the charges alleged against these defendants. Instead, the evidence, interpreted most favorably to the State, shows that the said defendants, without violating any rights of the public, were attempting to exercise their common law right of free access to the common market. To be denied that right by the State ejecting them from the business places described in the record and subjecting them to arrest solely on the basis of race and color, is a denial of the equal protection of the laws and due process of law as guaranteed by the 14th Amendment of the United States Constitution and Article 1, Section 5 of the South Carolina Constitution.

The Court: Motion denied.

Mr. Jenkins: At this time if your Honor please, on behalf of these defendants, I serve notice of intention to appeal and request that the Court set bond.

[fol. 56] The Court: Mr. Sholenberger, I think we might let the same cash bond stand as an Appeal Bond.

Mr. Jenkins: We just want the record to show that we are not paying any fine—

The Court: Let the record show that I am letting that stand as an Appeal Bond. Is there anything else?

Mr. Jenkins: If your Honor please, I discussed this matter yesterday, that in the previous hearing the Motions were passed to the Court Stenographer. I am certain it was the intention that they be entered in the record and I notice in taking the testimony that Mr. Cordell did not include them into the record. At this time I am requesting if your Honor please, that they be included.

The Court: I'll attach them to the testimony and make them a part of the record. They will be attached to the record and made a part of the record.

I hereby certify that the foregoing is a true and correct transcript of the stenographic notes of testimony taken by me at the trial of the above cases.

Jas. C. Cordell, Reporter.

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

OPINION—April 28, 1961

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sell drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general public in all the departments except the lunch depart-
[fol. 57] ment where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeal in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding

involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Sects. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.). (2) Was there any substantial evidence pointing to the [fol. 58] guilt of the Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpough* v. *Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

> "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120, p. 623; 43 C. J. S., Innkeepers, No. 20, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper. *Davidson* v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and eject others on purely personal grounds. *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

[fol. 59] In the *Williams* case, *supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, . . . U. S. . . . , 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

> "Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority*, handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack* cases, *supra*.

The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to [fol. 60] depart, on the request of the owner, will make him

a trespasser, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sect. 16-386 and breached the peace under Sect. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 845, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelly* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

[fol. 61] I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for-colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call a policeman to remove or arrest a white trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and, under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave, and they refused. They, thereupon, were trespassers and such constituted a breach of the [fol. 62] peace. In addition, Bouie admittedly resisted a lawful arrest.

The trespass statute (Section 16-386, as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as Defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers *ab initio*. Aside from this however, the law is that even though a person enters property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra.*

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *ordered.*

John W. Crews, Judge, Richland County Court.

Columbia, S. C., April 28, 1961.

[fol. 63]

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

NOTICE OF INTENTION TO APPEAL—May 2, 1961

To: Messrs. John W. Sholenberger and Edward A. Harter, Jr., Attorneys for the City of Columbia:

You will please take notice that the defendants above named intend to and do hereby appeal to the Supreme Court of South Carolina from the Order of the Richland County Court, Criminal Division, in the above entitled matter, dated April 28, 1961, upon a case and exceptions hereafter to be served upon you.

Jenkins & Perry, By: Lincoln C. Jenkins, Jr., Attorneys for Defendants.

Acceptance of service (omitted in printing).

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

EXCEPTIONS

1. The Court erred in refusing to hold that the City failed to prove a *prima facie* case.

2. The Court erred in refusing to hold that the City failed to establish the *corpus delicti.*

3. The Court erred in refsuing to hold that the evidence shows conclusively that the arresting officers acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

[fol. 64] 4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Taylor Street Pharmacy as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice in and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

IN THE RICHLAND COUNTY COURT, CRIMINAL DIVISION

STIPULATION

It is hereby stipulated and agreed by and between counsel for the appellants and respondent that the foregoing, when printed, shall constitute the Transcript of Record herein and that printed copies thereof may be filed with the Clerk of the Supreme Court and shall constitute the Return herein.

Respectfully submitted,

John W. Sholenberger, Edward A. Harter, Jr., Columbia, South Carolina, Attorneys for Respondent.

Jenkins & Perry, Columbia, South Carolina, By: Lincoln C. Jenkins, Jr., Attorneys for Appellants.

[fol. 65]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4777

THE CITY OF COLUMBIA, Respondent,

v.

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK, Appellants.

Appeal From Richland County, John W. Crews, County Judge.

Affirmed

Jenkins & Perry, of Columbia, for appellants.

John W. Sholenberger and Edward A. Harter, Jr., both of Columbia, for respondent.

OPINION No. 17857—Filed December 14, 1961

OXNER, A.J.: The five appellants, all Negroes, were convicted in the Municipal Court of the City of Columbia of trespass in violation of Section 16-386 of the 1952 Code, as amended, and of breach of the peace in violation of Section 15-909. Each defendant was sentenced to pay a fine of $100.00 or serve a period of thirty days in jail on each charge but $24.50 of the fine was suspended. From an order of the Richland County Court affirming their conviction, they have appealed.

The exceptions can better be understood after a review of the testimony. The charges grew out of a "sit-down" demonstration staged by appellants at the lunch counter of the Taylor Street Pharmacy in the City of Columbia, a privately owned business. In addition to selling articles usually sold in drugstores, this establishment maintains a lunch counter in the rear, separated from the front of the

store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you "could have heard a pin drop in there", and that "everyone was on pins and needles, more or less, for fear that it could possibly lead to violence." He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch counter stated to them, "You might as well leave because I ain't going to serve you", which they did not construe as [fol. 66] a specific request. They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did

so only after the employee at the lunch counter said: "Get up, we will get them out of here."

The questions involved are stated in appellants' brief as follows:

> "I. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4).
>
> "A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?
>
> "B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?
>
> "II. Did the State fail to establish the corpus delicti or prove a prima facie case? (Exceptions 1, 2)."

The questions designated 1, A and B, must be decided adversely to appellants under City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——, and City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) ——. Each of these cases involved a sit-down demonstration at a lunch counter in a privately owned place of business and the precise questions raised by Exceptions 3 and 4 in the instant case were raised in those cases and overruled. In the City of Charleston case we affirmed a conviction for violation of Section 16-386 as amended, which is the same section under which the appellants were convicted.

We think that Question II is based on exceptions too general to be considered. They are as follows:

> "1. The Court erred in refusing to hold that the City failed to prove a prima facie case.
>
> "2. The Court erred in refusing to hold that the City failed to establish the corpus delicti."

The foregoing exceptions do not comply with Rule 4, Section 6 of this Court. They do not point out in what respect the City failed to make out a prima facie case or to establish the corpus delicti. We do not know to which of the two offenses involved these exceptions are directed. We are not aided by appellants' brief. Only scant reference is there made to these two exceptions and apparently the position is taken that their determination is dependent upon the disposition of the other questions which we have held to be without merit.

It has been held that an exception to the effect that the judgment is contrary to the law and the evidence is too general to be considered. State v. Turner, 18 S. C. 103; State v. Cokley, 83 S. C. 197, 65 S. E. 174; State v. Davis, 121 S. C. 350, 113 S. E. 491. The same conclusion has been reached with reference to an exception "that plaintiff failed to make out a case against defendant." Concrete Mix, Inc. v. James, 231 S. C. 416, 98 S. E. (2d) 841. Other pertinent cases are reviewed in Howitt v. Reserve Life Insurance Co., 235 S. C. 201, 110 S. E. (2d) 852. It was pointed out in Brady v. Brady, 222 S. C. 242, 72 S. E. (2d) 193, that "every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."

In oral argument counsel for appellants raised the question of merger of the two offenses and argued that there could not be a conviction on both charges. But this question is not raised by any of the exceptions, is not referred to in the brief of appellants and, therefore, is not properly before us.

Affirmed.

Taylor, C.J., Legge, Moss and Lewis, JJ., concur.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 67]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4777

[Title omitted]

PETITION FOR REHEARING—Filed December 20, 1961

To the Honorable Chief Justice and Associate Justices of the Supreme Court of South Carolina:

Petitioners, Charles F. Barr, Richard M. Counts, David Carter, Milton D. Greene and Johnny Clark, respectfully request a rehearing in the above case. Petitioners submit that this Court in affirming that the judgment of the Court below may have overlooked or misapprehended certain facts and rules of law, urged by petitioners in their appeal.

1. The Court may have misapprehended that Section 16-386, Code of Laws of South Carolina for 1952, was invoked against petitioners in this case solely for the purpose of preserving and furthering the custom of excluding Negroes from lunch counters in Columbia, South Carolina or segregating them in same, in violation of petitioners' rights to due process of law and equal protection of the laws, protected by the Fourteenth Amendment to the United States Constitution.

[fol. 68] 2. The Court may have overlooked petitioners' assertion that they were unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment. The Court further overlooked the applicability of *Marsh* v. *Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276, and *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77, to this argument.

3. The Court may have overlooked petitioners' assertion that in arresting and prosecuting petitioners, the State has either enforced or supported racial segregation in a place open to the general public, thereby infringing their rights under the Fourteenth Amendment to the United States Constitution. Petitioners, in their appeal, did not challenge the right of the store manager to select his customers, but

asserted that the State cannot implement and enforce segregation by direct action on the part of its police nor by statutory scheme.

4. The Court may have overlooked or misapprehended that petitioners' convictions of the offenses of trespass after notice under Section 16-386, Code of Laws of South Carolina for 1952 and breach of peace under Section 15-909, Code of Laws of South Carolina for 1952, rested upon no evidence of any substantial element of either of said offenses, in violation of petitioners' right to due process of law under the Fourteenth Amendment to the United States Constitution. *Thompson* v. *City of Louisville*, 362 U.S. 199, 80 S. Ct. 629 (1960).

Conclusion

Wherefore, petitioners request they be granted a rehearing in this case.

Jenkins and Perry, Columbia, South Carolina, By Matthew J. Perry, Attorneys for Petitioners.

Columbia, South Carolina, December 20, 1961.

[fol. 69]

Certificate

I, Harold R. Boulware, hereby certify that I am a practicing attorney of this Court and am in no way connected with the within case. I further certify that I am familiar with the record of this case and have read the opinion of this Court which was filed December 14, 1961, and in my opinion there is merit in the Petition for Rehearing.

Harold R. Boulware

Columbia, South Carolina, December 20, 1961.

[fol. 70] [File endorsement omitted]

ORDER DENYING PETITION FOR REHEARING
—Filed January 8, 1962

The within petition for a rehearing is denied.

C. A. Taylor, C.J., G. Dewey Oxner, A.J., Lionel K. Legge, A.J., Joseph R. Moss, A.J., J. Woodrow Lewis, A.J.

[fol. 71]
IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4777

[Title omitted]

PETITION FOR STAY OF REMITTITUR

To the Honorable G. Dewey Oxner, Associate Justice of the Supreme Court of South Carolina:

The Petition of Charles F. Barr, Richard M. Counts, David Carter, Milton D. Greene and Johnny Clark, respectfully shows:

1.

Petitioners have been convicted of the offense of trespass after notice under Section 16-386, Code of Laws of South Carolina for 1952 and breach of peace under Section 15-909, Code of Laws of South Carolina for 1952. Their convictions and sentences have been affirmed by the Supreme Court of South Carolina in an Opinion which was filed on December 14, 1961.

2.

Thereafter, petitioners requested rehearing of said cause in a Petition therefor dated December 20, 1961. Rehearing was denied this day.

[fol. 72] 3.

Petitioners are aggrieved with said decision and intend to petition the Supreme Court of the United States for a Writ of Certiorari in order that that Court can pass upon petitioners' contention that their arrests and convictions were in furtherance of a custom of racial segregation and rested upon no evidence of any substantial element of said offenses in violation of their rights to due process of law and equal protection of the law, protected by the Fourteenth Amendment to the United States Constitution.

4.

Under the Rules of the United States Supreme Court, petitioners have ninety (90) days after the rehearing of the final judgment of this Court within which to file their Petition for Writ of Certiorari. Petitioners are therefore desirous of obtaining a stay of the sentences imposed upon them and a Stay of the Remittitur herein for a period of ninety (90) days after the rendering of the final judgment of this Court in order that they may have time within which to file said Petition for Writ of Certiorari.

5.

Counsel for the City of Columbia have agreed to a proposed Order, Staying the Remittitur for the requested period.

Wherefore, petitioners pray that execution of their sentences be stayed and that Remittitur in this matter be stayed by order to this Honorable Court for a period of [fol. 73] ninety (90) days after the final judgment of said Court in order that petitioners may file in the United States Supreme Court a Petition for Writ of Certiorari.

Jenkins and Perry, Columbia, South Carolina, By: Matthew J. Perry, Attorneys for Appellants.

[File endorsement omitted]

[fol. 74]

IN THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Case No. 4777

CITY OF COLUMBIA, Respondent,

against

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK, Appellants.

ORDER STAYING REMITTITUR—January 8, 1962

On the 14th day of December, 1961, we issued an Opinion in the above case, affirming the judgment of the Richland County Court which sustained the judgment of the Recorder's Court of the City of Columbia wherein appellants were convicted of violating Section 16-386, Code of Laws of South Carolina for 1952, namely, Trespass after Notice, and Section 15-909, Code of Laws of South Carolina for 1952, namely, Breach of Peace.

Thereafter, appellants petitioned this Court for a rehearing and, on January 8, 1962 we entered an Order, denying same.

Appellants have now indicated that they desire and intend to file in the Supreme Court of the United States a Petition for Writ of Certiorari, seeking review of our judgment in said cause. Under the rules and decisions of the United States Supreme Court, they have ninety (90) days after the final judgment of this Court within which to file [fol. 75] their Petition for Writ of Certiorari. The final judgment of this Court is the Order, denying rehearing. *Department of Banking, State of Nebraska* v. *Pink*, 63 S. Ct. 253, 217 U. S. 264, 87 L. Ed. 254. They desire a stay of the Remittitur and Sentences in this matter pending the filing of their Petition for Writ of Certiorari in the United States Supreme Court and thereafter until said matter has been disposed of by that Court. It appears that the request for stay of remittitur and sentences is proper. Now, on

motion of counsel for the appellants, by and with the consent of counsel for the respondent,

It Is Ordered that the Remittitur and execution of the Sentences herein be stayed for a period of ninety (90) days after the day of the final judgment of this Court in order that petitioners may file with the United States Supreme Court their Petition for Writ of Certiorari.

It Is Further Ordered that if a notice from the Clerk of the United States Supreme Court that the Petition for Writ of Certiorari has been filed in that Court is filed with the Clerk of the Supreme Court of South Carolina within the time aforesaid, the Stay of Remittitur and execution of Sentences herein shall continue in effect until final disposition of the case by the Supreme Court of the United States.

G. Dewey Oxner, Associate Justice.

January 8, 1962.

We Consent: John W. Sholenberger, Edward A. Harter, Jr., Attorneys for Respondent.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 76] Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 78]

SUPREME COURT OF THE UNITED STATES

No. 90—October Term, 1962

CHARLES F. BARR, et al., Petitioners,

vs.

CITY OF COLUMBIA.

ORDER ALLOWING CERTIORARI—June 10, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~[illegible] 70~~ #9 1963

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Petitioners,

—v.—

THE CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Petitioners,

—v.—

THE CITY OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, entered in the above entitled case on December 14, 1961 rehearing of which was denied January 8, 1962.

Citation to Opinions Below

The opinion of the Supreme Court of South Carolina, which opinion is the final judgment of that Court, is reported at 123 S. E. 2d 521 (1961) and is set forth in the appendix hereto, *infra*, pp. 8a-12a. The opinion of the Richland County Court is unreported and is set forth in the appendix hereto, *infra*, pp. 1a-7a.

Jurisdiction

The Judgment of the Supreme Court of South Carolina was entered December 14, 1961, *infra*, p. 12a. Petition for rehearing was denied by the Supreme Court of South Carolina on January 8, 1961, *infra*, p. 13a.

Questions Presented

1. Whether the Court below denied petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States to freedom from state supported racial discrimination and freedom of expression, where petitioners have been convicted of the crimes of trespass and breach of the peace for having remained seated at the lunch counter of a licensed drug store which was open to the public (including petitioners), but was pursuing a practice of serving Negroes take-out food orders only while serving white persons at counter seats, in conformity with state custom of segregation, and where petitioners were ordered to leave solely on the basis of race and were arrested and convicted in support of the racially discriminatory practice.

2. Whether petitioners were denied their rights to free expression as protected by the due process clause of the Fourteenth Amendment:

(a) when convicted for engaging in a sit-in protest demonstration,

(b) and when said convictions were under statutes so vague as to give no fair warning that their conduct was prohibited.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Section 16-386, Code of Laws of South Carolina, 1952, as amended 1960:

> 16-386 Entry on lands of another after notice prohibiting same.
>
> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.

3. This case involves Section 15-909, Code of Laws of South Carolina, 1952:

> 15-909 Disorderly Conduct, etc.
>
> The mayor or intendant and any alderman, councilman or warden of any city or town in this State may in person arrest or may authorize and require any marshall or constable especially appointed for that purpose to arrest any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct

grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council such person may be committed to the guardhouse which, the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain-gang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars; provided that this section shall not be construed to prevent trial by jury.

Statement

Petitioners, five Negro students, were arrested for participating in a sit-in demonstration at the Taylor Street Pharmacy in the City of Columbia, South Carolina, and were convicted of trespass and breach of the peace in violation of Section 16-386, as amended, and Section 15-909, respectively, of the Code of Laws of South Carolina, 1952 (R. 1). They were sentenced to pay a fine of one hundred dollars on each charge, or serve thirty days on each charge (R. 1).

Petitioners, students at the nearby Benedict College, entered the Taylor Street Pharmacy on March 15, 1960 in the afternoon. They proceeded to the lunch counter in the rear of the store, after some had made purchases in the front portion, and seated themselves at the lunch counter (R. 9, 39). The policy of the store was to serve Negroes on the same basis as whites at all places in the store except the lunch counter (R. 23). At the lunch counter Negroes could secure food to be removed from the store, but were not to sit at the counter and eat their purchases (R. 24). There was a general sign that the manager reserved the

right to refuse service, but there was no sign specifically barring use of the counter by Negroes (R. 25). The State police had alerted the manager that a sit-down demonstration would occur, and had detailed three policemen to the store (R. 3, 25). As petitioners sat down some of the white patrons at the counter stood up (R. 17). The manager came to the counter and informed petitioners that they "might as well leave" because they would not be served (R. 32). Petitioners did not leave at this request (R. 32). Police Officer Stokes then directed the manager to request again that petitioners leave, which he did (R. 18). Shortly thereafter the police officers arrested petitioners (R. 5). The manager had left the luncheon area after his announcement to the petitioners, and the police officers arrested petitioners without a direct request from him (R. 19, 21). The co-owner of the restaurant in addition to being informed by the police of the coming demonstration, testified that: "We [the police and himself] had a previous agreement to the effect, that if they did not leave, they would be placed under arrest for trespassing" (R. 29), and later:

> "Q. Was it your idea to have these defendants arrested, or was it the idea of the police department? A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, that they would be arrested" (R. 30).

The petitioners were well-dressed, orderly and did not physically interfere with any other customers throughout the whole of their request for service at the lunch counter (R. 8, 27). The co-owner of the restaurant replied affirmatively that there was no difference between the dress and demeanor of the petitioners and other customers "other than the color of their skin" (R. 27).

How the Federal Questions Were Raised

At the close of the trial in the Recorder's Court of the City of Columbia, petitioners moved to dismiss the charges against them alleging: the evidence showed the arrests were State enforcement of discrimination based solely on the petitioners' race and that petitioners were deprived of the liberty of protesting segregation through requesting to be served as others; all in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (R. 46-50). The motion was denied (R. 50-52). Defendants also moved for arrest of judgment, or in the alternative, for a new trial raising the same issues as raised under the motion to dismiss (R. 54-55). These motions were denied (R. 55).

After considering petitioners' exceptions (R. 57), the Richland County Court, on appeal held:

> The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State constitutional provisions.
>
> And the proprietor can chase his customers without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic White Towers, etc.*, 181 F. Supp. 124 (Dist. Court Md.) 284 F. (2d) 746" (R. 58).

In appealing to the Supreme Court of South Carolina, petitioners set forth the following exceptions to the judgment below (R. 63-64).

Exceptions

3. The Court erred in refusing to hold that the evidence shows conclusively that the arresting officers

acted in the furtherance of a custom, practice and policy of discrimination based solely on race or color, and that the arrests and convictions of appellants under such circumstances are a denial of due process of law and the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution.

4. The Court erred in refusing to hold that the evidence establishes merely that at the time of their arrests appellants were peaceably upon the premises of Taylor Street Pharmacy as customers, visitors, business guests or invitees of a business establishment performing economic functions invested with the public interest, and that the procurement of the arrest of appellants by management of said establishment under such circumstances in furtherance of a custom, practice in and policy of racial discrimination is a violation of rights secured appellants by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of South Carolina disposed adversely of all of petitioners' constitutional claims. After a summary of the facts, the court stated:

The questions involved are stated in appellants' brief as follows:

1. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?

B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?

The questions designated 1, A and B, must be decided adversely to appellants under City of Greenville v. Peterson, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——, and City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) ——. Each of these cases involved a sit-down demonstration at a lunch counter in a privately owned place of business and the precise questions raised by Exceptions 3 and 4 in the instant case were raised in those cases and overruled. In the City of Charleston case we affirmed a conviction for violation of Section 16-386 as amended, which is the same section under which the appellants were convicted.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Prior Decisions of This Court Which Condemn the Use of State Power to Enforce a State Custom of Racial Segregation.

In this case it is clear that the petitioners were refused service, ordered to leave the lunch counter, arrested and convicted of crimes on the basis of their race pursuant to and in the enforcement of a policy of racial discrimination. It is undisputed that the practice of the Taylor Street Pharmacy was to stand ready to serve food at its lunch counter seats to white persons and to refuse such service to all Negroes; that it was the policy to serve Negroes only when they were taking the food elsewhere to eat; and that petitioners were refused service solely because of their race and for no other reason. It is also apparent that the arrests were made to support this discrimination, and that

the trial court convicted petitioners on evidence plainly indicating that race, and race alone, was the reason they were ordered to leave the lunch counter, and consequently arrested and charged upon their failure to leave. This is thus a case where the difference in treatment to which petitioners have been subjected is clearly a racial discrimination.

There are several dominant and relevant components of action by state officials in the chain of events leading to appellants' conviction and punishment for violating the racially discriminatory customs. The police alerted the co-owner of the store that an attempt to integrate the lunch counters would occur on the day the petitioners frequented the store (R. 3, 25). They had made an agreement with this proprietor to secure the arrest of the petitioners and had dispatched an extra detail of police to the premises prior to petitioners' arrival (R. 3, 25). Although one police officer testified he was only on the scene to prevent violence (R. 7) the co-owner testified that the prearranged plan with the police was for the petitioners to be arrested if they failed to conform to requests to leave the white lunch counter (R. 30). It was the police officer who directed the manager to give the final request to the petitioners to leave (R. 18). Here, as in all criminal prosecutions, there is further state action by state officers in the persons of the prosecutors and judges; the official actions of such officers are "state action" within the meaning of the Fourteenth Amendment under clear authorities. The subject of judicial action as "state action" was treated exhaustively in part II of Chief Justice Vinson's opinion in *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18; cf. *Boynton* v. *Virginia*, 364 U. S. 454. Policemen (*Screws* v. *United States*, 325 U. S. 91; *Monroe* v. *Pape*, 365 U. S. 167) and prosecutors (*Napue* v. *Illinois*, 360 U. S. 264) are equally subject to the restraints of the Fourteenth Amendment.

Ever since the *Civil Rights Cases*, 109 U. S. 3, 17, it has been conventional doctrine that racial discrimination when supported by state authority, violates the Fourteenth Amendment's equal protection clause; and since *Brown* v. *Board of Education*, 347 U. S. 483, it has been settled that racial segregation constitutes a forbidden discrimination.

However, in this case the involvement of the public law enforcement and judicial officers in the racial discrimination practiced against petitioners through their use of the state's criminal law machinery to support and enforce it, is now sought to be excused because, it is said, there is also "private action" in the picture, and the state is said to be merely enforcing "private property" rights through its criminal trespass and breach of the peace laws. It is argued that the state is not really excluding and punishing Negroes, but only "trespassers" inciting a breach of the peace, and that the state stands ready to punish whites in these circumstances as well. While petitioners are aware of no case of a white person convicted for refusing to leave an all-Negro establishment under a trespass or breach of the peace law,[1] there is no reason to doubt that this might occur in communities deeply wedded to the segregation customs. The answer made to a parallel argument in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, is apt—"Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

But the argument that it is only trespassers inciting a breach of peace and not Negroes qua Negroes who are punished by the State, and thus it is private property rights and order and not racial discrimination that is being preserved by the state's officers and laws, requires further anal-

[1] White persons have been convicted for trespass when in company with Negroes in "white only" establishments. *Avent* v. *North Carolina*, No. 85, October Term 1961.

ysis. We shall examine in turn, the specific nature of the property right and the state's legitimate interests including protection of the right to privacy and general tranquility, and their relation to state customs and laws.

As a starting point it is fit to observe, as this Court did in *Shelley* v. *Kraemer, supra,* that the mere fact that property rights are involved does not settle the matter. The Court said at 334 U. S. 1, 22:

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh* v. *Alabama,* 326 U. S. 501, 90 L. ed. 265, 66 S. Ct. 276 (1946)."

This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley,* 245 U. S. 60, 74; *United States* v. *Willow River Power Co.,* 324 U. S. 499, 510; *Marsh* v. *Alabama,* 326 U. S. 501, 506; cf. *Munn* v. *Illinois,* 94 U. S. 113. As the Court said in *Marsh, supra,* "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 796, 802."

Because it does matter a great deal what kind of property interest is being created and enforced by the State in given circumstances, we must inquire: What is the nature of the property right of the Taylor Street Pharmacy which is being enforced by the state in the criminal trespass charge?

The Taylor Street Pharmacy used the premises involved in its commercial business as a drug store opened to the public generally for the transaction of business including the sale of food and beverages at its lunch counter. This case does not involve enforcement of a general desire to keep everyone, or Negroes, or even these petitioners, from coming upon the premises. The white public was invited to use all the facilities of the drug store, and the Negro public was invited to use all facilities except the lunch counter stools. Negroes were even welcomed to purchase food at the lunch counter provided they stood up to purchase it and left the store to eat. The property interests enforced for the Taylor Street Pharmacy do not involve the integrity of a portion of its premises set aside for non-public use, such as space reserved for the owner or its employees. Nor does the property interest enforced here relate to an owner's claim that a portion of its premises is being sought to be used for a purpose alien to its normal or intended function. Petitioners merely sought to use a lunch counter stool while consuming food sought to be purchased on the premises, the purpose for which the stools were being maintained. The state is not being called upon here to enforce a property owner's general desire not to sell its goods to Negroes, since food and beverages were offered for sale to Negroes at this counter if they remained standing and took their purchases away with them. And further the proprietor himself, by opening every other department of his store to Negroes on the same basis as whites, has in the most affirmative manner possible stated that the mere fact of the purchaser's race is not disruptive of any operating business.

The property interest which *is* being enforced here is a claimed right to open premises to the public generally (including Negroes) for business purposes, including the sale of food and beverages, while racially discriminating against Negroes qua Negroes at one of the facilities for the public in the business premises—including a claimed right to have Negroes arrested and criminally punished for failing to obey the owner's direction for them to leave this portion of the store. This claimed property right—the right to racially discriminate against Negroes with respect to being seated in the circumstances indicated—is indeed a type of property interest. The question remains whether the States' laws can give recognition and enforcement to such an interest without violating the Fourteenth Amendment.

Petitioners submit that it is readily apparent that the property interest being enforced against them on behalf of the Taylor Street Pharmacy, bears no substantial relation to any constitutionally protected interest of the property owner in privacy in the use of his premises. The State is not in this prosecution engaged in protecting the right to privacy. It has long been agreed by the courts that a state can "take away" this property right to racially segregate in public accommodation facilities without depriving an owner of Fourteenth Amendment rights. *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667, 49 A. L. R. 499 (1926); *People* v. *King*, 110 N. Y. 418, 18 N. E. 245 (1888); Annotation 49 A. L. R. 505; cf. *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

And indeed a great number of states in our Nation have enacted laws making it criminal to engage in just the type of racially discriminatory use of private property which the Drug Company seeks state assistance in preserving

here.[2] From the fact that the States can make the attempted exercise of such a "right" a crime, it does not follow necessarily and automatically that they must do so, and must refuse (as petitioners here urge) to recognize such a claimed property right to discriminate racially in places of public accommodation. But the fact that the States can constitutionally prohibit such a use of property and that when they do so they are actually conforming to the egalitarian principles of the Fourteenth Amendment (*Railway Mail Ass'n* v. *Corsi, supra*, at 93-94) makes it evident that the property interest asserted by the Taylor Street Pharmacy is very far from an inalienable or "absolute" property right. Indeed the property owner here is attempting to do something that the state itself could not permit him to do on state property leased to him for his business use (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 175), or require or authorize him to do by positive legislation (cf. Mr. Justice Stewart's concurring opinion in *Burton, supra*).

A basic consideration in this case is that the pharmacy lunch counter involved is a public establishment in the sense that it is open to serve the public and is part of the public life of the community (Mr. Justice Douglas, concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 176). As a consequence of the public use to which the property has been devoted by the owner, this case involves no real claim that the right to privacy is being protected by this use of the State's trespass laws. And, of course, it does not follow from the conclusion that the State cannot enforce the racial bias of the operator of a lunch counter open to the public, that it could not enforce a similar bias by the use of trespass laws against an intruder into a private dwelling or any

[2] See collections of such laws in Konvitz, *A Century of Civil Rights*, Passim (1961).

other property in circumstances where the state was exercising its powers to protect an owner's privacy. This Court has recently reiterated the principle that there is a constitutional "right to privacy" protected by the Due Process clause of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 1090, 1103, 1104; see also *Poe* v. *Ullman*, 367 U. S. 497, 6 L. ed. 2d 989, 1106, 1022-1026 (dissenting opinions). It is submitted that due consideration of the right to privacy affords a sound and rational basis for determining whether cases which might arise in the future involving varying situations should be decided in the same manner urged by petitioner here—that is, against the claimed property interest. Only a very absolutist view of the property "right" to determine those who may come or stay on one's property on racial grounds —an absolutist rule yielding to no competing considerations—would require that the same principles apply through the whole range of property uses, public connections, dedications, and privacy interests at stake. The Court has recognized the relation between the right of privacy and property interests in the past. See e.g. *Thornhill* v. *Alabama*, 310 U. S. 88, 105-106; *Breard* v. *Alexandria*, 341 U. S. 622, 626, 638, 644.

Petitioners submit that a property right to determine on a racial basis who can stay on one's property cannot be absolute at all, for this claimed right collides at some points with the Fourteenth Amendment right of persons not to be subjected to racial discrimination at the hand of the government. *Burton* v. *Wilmington Parking Authority, supra; Shelley* v. *Kraemer, supra.* Mr. Justice Holmes said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355.

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the

neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Petitioners certainly do not contend that the principles urged to prevent the use of trespass laws to enforce racial discrimination in a lunch counter operated as a public business would prevent the state from enforcing a similar bias in a private home where the right of privacy has its greatest meaning and strength. A man ought to have the right to order from his home anybody he prefers not to have in it, and ought to have the help of the government in making his order effective. Indeed, the State cannot constitutionally authorize an intrusion into a privat home except in the most limited circumstances with appropriate safeguards against abuses. *Mapp* v. *Ohio, supra;* cf. *Frank* v. *Maryland,* 359 U. S. 360. Racial discrimination in a private home, or office, or other property where the right of privacy is paramount is one thing. Racial discrimination at a public counter is quite another thing indeed.

The involvement of the State of South Carolina as a whole entity in the present discrimination is so intimate and manifold that the state action standard may be satisfied or bolstered by other criteria than the participation of its police and courts in enforcing the discriminatory result complained of by petitioners. For racial discrimination has deep roots in South Carolina custom and law. "Custom" is specifically included in the opinion in the *Civil Rights Cases* as one of the forms of "state authority" which might be used in efforts to support a denial of Fourteenth Amendment rights (109 U. S. 3, at 17). See also Mr. Justice Douglas concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 176.

The Taylor Street Pharmacy in excluding Negroes from its lunch counter was following a custom of segregating Negroes in public life which is characteristic of South Carolina as a community, and which custom has been firmed up and supported by the segregation policies and laws of South Carolina as a policy.[3]

The segregation laws form an edifice created by law—the systematic segregation of Negroes in public life in South Carolina. There is good ground for belief that the segregation system, of which the custom enforced by the Taylor Street Pharmacy is a part, was brought into being or at least given firm contour in its beginning, by State laws.

As Mr. Justice Douglas wrote recently concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 181:

> "Though there may have been no state law of municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic

[3] S. C. A. & J. R. 1952 (47) 2223, A. & J. R. 1954 (48) 1695 repealing S. C. Const. Art. II, §5 (1895) (which required legislature to maintain free public schools). S. C. Code §§21-761 to 779 (regular school attendance) repealed by A. & J. R. 1955 (49) 85; §21-2 (appropriations cut off to any school from which or to which any pupil transferred because of court order; §21-230(7) (local trustees may or may not operate schools); §21-238 (1957 Supp.) (school officials may sell or lease school property whenever they deem it expedient); S. C. Code §40-452 (1952) (unlawful for cotton textile manufacturer to permit different races to work together in same room, use same exits, bathrooms, etc., $100 penalty and/or imprisonment at hard labor up to 30 days; S. C. A. & J. R. 1956 No. 917 (closing park involved in desegregation suit); S. C. Code No. §§51-1, 2.1-2.4 (1957 Supp.) (providing for separate State Parks) §51-181.2 (separate recreational facilities in cities with population in excess of 60,000); §5-19 (separate entrances at circus); S. C. Code Ann. Tit. 58, §§714-720 (1952) (segregation in travel facilities).

to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. If these proprietors also choose segregation, their preference does not make the action 'private', rather than 'state' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise. *Baldwin* v. *Morgan, supra; Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531."

Finally the property involved in this case is "affected with a public interest," *Munn* v. *Illinois*, 94 U. S. 113. By its use it has become "clothed with a public interest . . . [is] of public consequence, and affect[s] the community at large" (*Id.* at 126). This property is operated as a lunch counter under a license granted by the City of Columbia (R. 23). The licensing by the state demonstrates the public's interest in the business and the governmental recognition of this public character. As Mr. Justice Douglas stated concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 184: "A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."

The charge of breach of the peace has the same posture as that of trespass and is even more simply a direct instance of state power being utilized to enforce segregation. There was absolutely no evidence of violence or threats of violence by petitioners directed toward anyone. The only testimony remotely resembling a disturbance of the peace was to the effect that some whites "stood up" when petitioners sat down; any inference of threatened violence by these persons would therefore stand on a weak reed. But even if the record contained a showing that these whites were about

to unlawfully attack petitioners, the prohibition of state enforcement of segregation under the Fourteenth Amendment is of course a rejection of all the reasons why segregation might be thought good, including fear of disorder. *Buchanan* v. *Warley, supra; Cooper* v. *Aaron*, 358 U. S. 1.

It is submitted that the totality of circumstances in this case, including the actions of the State's officers in arranging the arrests and prosecuting petitioners, the municipal licensing of the property involved and the consequent public character of the business property involved, the plain and invidious racial discrimination involved in the asserted property rights being protected by the state, the absence of any relevant component of privacy to be protected by the state's action in light of the nature of the owner's use of his property, and the state custom of segregation which has created or at least substantially buttressed the type of discriminatory practices involved, are sufficient to require a determination that the petitioners' trespass and breach of the peace convictions have abridged their rights under the Fourteenth Amendment.

II.

The Decision Below Conflicts With Decisions of This Court Securing the Right of Freedom of Expression Under the Fourteenth Amendment to the Constitution of the United States.

Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana, supra*. Petitioners' expression (asking for service) was entirely appropriate to

the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions. Their protest demonstration was a part of the "free trade in ideas" (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting), and was within the range of liberties protected by the Fourteenth Amendment, even though nonverbal. *Stromberg* v. *California*, 283 U. S. 359 (display of red flag); *Thornhill* v. *Alabama*, 310 U. S. 88 (picketing); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633-624 (flag salute); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (freedom of association).

Petitioners do not urge that there is a Fourteenth Amendment right to free expression on private property to all cases or circumstances without regard to the owner's privacy, and his use and arrangement of his property. This is obviously not the law. In *Breard* v. *Alexandria*, 341 U. S. 622 the Court balanced the "householder's desire for privacy and the publisher's right to distribute publications" in the particular manner involved, and upheld a law limiting the publisher's right to solicit on a door-to-door basis. But cf. *Martin* v. *Struthers*, 319 U. S. 141 where different kinds of interests were involved with a corresponding difference in result.

As was true with the discussion above of the racial discrimination issue, so the free expression issue is not resolved merely by reference to the fact that private property rights are involved. The nature of the property rights asserted and of the state's participation through its of-

fieers, its customs, and its creation of the property interest, have all been discussed above in connection with the state action issue as it related to racial discrimination. Similar considerations should aid in resolving the free expression question.

In *Garner* v. *Louisiana*, Mr. Justice Harlan, concurring, found a protected area of free expression on private property on facts regarded as involving "the implied consent of the management" for the sit-in demonstrators to remain on the property. It is submitted that even absent the owner's consent for petitioners to remain on the premises of this pharmacy, a determination of their free expression rights requires consideration of the totality of circumstances respecting the owner's use of the property and the specific interest which state judicial action is supporting. *Marsh* v. *Alabama, supra.*

In *Marsh, supra*, this Court reversed trespass convictions of Jehovah's Witnesses who went upon the privately owned streets of a company town to proselytize for their faith, holding that the conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, the Court upheld a labor board ruling that lacking special circumstances employer regulations forbidding all union solicitation on company property constituted unfair labor practices. See *Thornhill* v. *Alabama, supra*, involving picketing on company-owned property; see also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945); and compare the cases mentioned above with *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252, condemning an employee seizure of a plant. In *People* v. *Barisi*, 193 Misc. 934, 83 N. Y. S. 2d 277, 279 (1948) the Court held that picketing within Pennsylvania Railroad Station was not a

trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it." See also *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959); and *State of Maryland* v. *Williams*, Baltimore City Court, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959).

In the circumstances of this case the only apparent state interest being subserved by this trespass prosecution, is support of the property owner's discrimination in conformity to the State's segregation custom and policy. This is all that the property owner has sought.

Where free expression rights are involved, the questions for decision is whether the relevant expressions are "in such circumstances and . . . of such a nature as to create a clear and present danger that will bring about the substantive evil" which the state has the right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. The only "substantive evil" sought to be prevented by this trespass prosecution is the elimination of racial discrimination and the stifling of protest against it; but this is not an "evil" within the State's power to suppress because the Fourteenth Amendment prohibits state support of racial discrimination.

The fact that the arrest and conviction were designed to short circuit a bona fide protest is strengthened by the necessity of the state court to make a strained and novel interpretation of the statutes in order to bring petitioners' conduct within their ambit. Petitioners' conviction for trespass rests on an interpretation which flies in the face of the plain words of the statute, all prior applications, and ignores the most recent legislative amendment to said statute. The trespass statute prior to amendment read:

> Every entry upon the lands of another after notice from the owner or tenant prohibiting such entry shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county in which such lands are situated, a proof of the posting and of publishing of such notice within twelve months prior to entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of hunting or fishing on such land. (Code of Laws, South Carolina, 1952.)

The amended statute under which petitioners' convictions were had added the language which is italicized:

> Every entry upon the lands of another *where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another* . . .

The Legislature obviously limited the statute to trespass on land primarily used for farm purposes nor was this a major innovation, for petitioners have been able to find no cases under the instant criminal statute or its predecessors in which the trespass punished was not for entry on land (generally farm land) or some adjunctive land such as on the road. See *State* v. *Green*, 35 S. C. 266; *State* v. *Mays*, 24 S. C. 190; *State* v. *Tenney*, 58 S. C. 215; *State* v. *Hallback*, 40 S. C. 298; *State* v. *Gray*, 76 S. C. 83 (all cases of trespass on land or specifically farm land). The amendment was merely declaratory, making explicit on the face of the statute the prior applications. The action of the court

below in extending the statute to business premises is, therefore, completely novel and unsupported by prior cases or the recent amendment.

Further, the statute in terms prohibits only going on the land of another *after* being forbidden to do so. The Supreme Court of South Carolina has now construed the statute to prohibit also remaining on property when directed to leave the following lawful entry. In short, the statute is now applied as if "remain" were substituted for "enter." There is no history to support this second novel construction of the statute. No South Carolina case has ever adopted such a construction. The instant case is the first case which directly or indirectly convicts defendants who went upon business premises with permission and merely refused to leave when directed for unlawful "entry."

Subsequent to petitioners' conviction the legislature of the State of South Carolina enacted into law Section 16-388 a trespass statute making criminal failing and refusing "to leave immediately upon being ordered or requested to do so" the premises or place of business of another. See Petition for Writ of Certiorari in *Peterson, et al.* v. *City of Greenville,* filed in this Court February 26, 1962, 30 U. S. L. Week 3276.

There is no question but that petitioners and all Negroes were welcome within the Taylor Street Pharmacy—apart from the lunch counter stools. The lunch counter is an integral part of the store and can only be reached by "entry" into the store proper—to which petitioners were admittedly invited. Absent the special expansive interpretation given Section 16-386 by the Supreme Court of South Carolina the case would plainly fall within the principle of *Thompson* v. *City of Louisville,* 362 U. S. 199, and would be a denial

of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered upon land of a farmlike character "after having been forbidden to do so" and the conclusion that they did rests solely upon the special construction of the law.

The escape from invalidity of the conviction for lack of evidence of guilt via a construction completely unpredictable by the words of the statute or any prior applications renders the statue vague as being without sufficient prior definition of the acts prohibited. Under the novel interpretation conduct is reached which the words of the statute do not fairly and effectively proscribe, thus depriving petitioners of any notice that their acts would subject them to criminal liability.

The vice of vagueness is particularly odious where the right of free speech is put in jeopardy. Conduct involving free speech can only be prohibited within a statute "narrowly drawn to define and punish specific conduct as constitute a clear and present danger to a substantial interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308; *Garner* v. *Louisiana*, 368 U. S. 157, 185 (Mr. Justice Harlan concurring). If the Supreme Court of South Carolina can affirm the convictions of these petitioners by such a construction they have exacted obedience to a rule or standard that is so ambiguous and fluid as to be no rule or standard at all. *Champlin Ref. Co.* v. *Corporation Com. of Oklahoma*, 286 U. S. 210. Such a result cannot but have a "potentially inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 205, 210. But when free expression is involved, the standard of precision is greater; the scope of construction must, therefore, be consequently less. If this is the case when a State court limits a statute it must *a fortiori* be the case when a State court expands the mean-

ing of the plain language of a statute. *Winters* v. *New York*, 333 U. S. 507, 512.

The above threat to free speech is also present under the conviction for breach of the peace. Even under a strained inference that the standing up of the whites was a threat to attack the petitioners, such an attack would be completely unlawful. Yet, the imminence of such an attack *by others* is the sum and substance of the charge of breach of the peace *against petitioners*. Again, petitioners were not effectively warned by the statute that they were participating in criminal conduct solely by being present to protest racial segregation where others might do unlawful violence on their persons. Free speech was similarly denied by conviction under the breach of the peace statute which in no wise definitively prohibited petitioners' conduct.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

RICHLAND COUNTY COURT

CITY OF COLUMBIA,

Respondent,

—v.—

BARR, *et al.*,

Appellants.

Order of the Richland County Court

These Appeals from the Recorder's Court of The City of Columbia were orally argued together before me and taken under advisement. The facts are largely undisputed. All of the Defendants are Negroes. Eckerd's Drug Store and Taylor Street Pharmacy are separate stores in The City of Columbia. Besides filling prescriptions, each sell drugs and sundries and has a section where lunch, light snacks and soft drinks are served. Trade is with the general public in all the departments except the lunch department where only white people are served.

On one occasion, Bouie and Neal went into Eckerd's and on another day the other Defendants went into the Taylor Street Pharmacy, sat down in the lunch department and waited to be served. All said they intended to be arrested. In each case, the manager of the store came up to them with a peace officer and asked them to leave. They refused to do so and were then placed under arrest and charged with trespass and breach of the peace. Bouie, in addition, was charged with resisting arrest. It is undenied that he resisted.

Order of the Richland County Court

Bouie and Neal were tried on March 25, 1960, and the other Defendants on March 30, 1960, before The Honorable John I. Rice, City Recorder of Columbia, without a jury; trial by jury having been waived by all the Defendants.

All the Defendants were convicted and sentenced and these appeals followed. Motions raising the constitutional questions were timely made.

There are 16 grounds of Appeals in the Bouie and Neal proceeding and 13 grounds of appeal in the proceeding involving the other Defendants, raising the following questions: (1) Did the State deny Defendants, who are Negroes, due process of law and equal protection of the laws within the Federal and State Constitutions either by using its peace officers to arrest them or by charging them with violating Sects. 16-386 (Criminal Trespass) and 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended, when they refused to leave a lunch counter when asked by the manager thereof to do so? (Bouie and Neal Nos. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15; other Defendants, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13.) (2) Was there any substantial evidence pointing to the guilt of the Defendants? (Bouie and Neal, No. 8; other Defendants, No. 7.)

Since Defendants did not argue Bouie and Neal's Exceptions 7, 9 and 16, I have considered them abandoned.

The State has not denied Defendants equal protection of the laws or due process of law within the Federal or State Constitutional provisions.

A lunch room is like a restaurant and not like an inn.

The difference between a restaurant and an inn is explained in *Alpaugh* v. *Wolverton*, 36 S. E. (2d) 907 (Court of Appeals of Virginia) as follows:

Order of the Richland County Court.

"The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. 28 A. Jr., Innkeepers, No. 120. p. 623; 43 C. J. S., Innkeepers, No. 20, subsection b, p. 1169. His responsibilities and rights are more like those of a shopkeeper. *Davidson* v. *Chinese Republic Restaurant Co.*, 201 Mich. 389, 167 N. W. 967, 969, L. R. A. 1919 E, 704. He is under no common-law duty to serve anyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. *Nance* v. *Mayflower Tavern, Inc.*, 106 Utah 517, 150 P. (2d) 773, 776; *Noble* v. *Higgins*, 95 Misc. 328, 158 N. Y. S. 867, 868."

And the proprietor can choose his customers on the basis of color without violating constitutional provisions. *State* v. *Clyburn*, 101 S. E. (2d) 295, 247 N. C. 455; *Williams* v. *Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack* v. *Atlantic Whitetower, etc.*, 181 F. Sup. 124 (Dist. Court Md.), 284 F. (2d) 746.

In the *Williams* case, *supra*, Judge Soper, speaking for the Court of Appeals for The Fourth Circuit, said: "As an instrument of local commerce, the restaurant is not subject to the Constitution and statutory provisions above (Commerce Clause and Civil Rights Acts of 1875), and is at liberty to deal with such persons as it may select."

And in *Boynton* v. *Virginia*, ... U. S. ....., 81 S. Ct. 182, 5 L. Ed. (2d) 206, The Supreme Court of The United States took care to state:

"Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a

wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers."

I have reviewed all of the cases cited by both the City and the Defendants, and in addition have reviewed subsequent cases of the Court of Appeals and The United States Supreme Court, including the case of *Burton* v. *Wilmington Parking Authority*, handed down on April 17, 1961, and find none applicable or controlling except the *Williams* and *Slack* cases, *supra*.

The Defendants, under South Carolina law, had no right to remain in the stores after the manager asked them to leave. *Shramek* v. *Walker*, 149 S. E. 331, 152 S. C. 88. As the Court quoted the rule, "while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser, and justify the owner in using reasonable force to eject him."

If the manager could have ejected Defendants himself, he could call upon officers of the law to eject them for him.

Since the Defendants refused to leave, they were criminal trespassers under Sect. 16-386 and breached the peace under Sect. 15-909 of The Code of Laws of South Carolina, 1952, and their conviction was proper.

Shelly v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 845, 68 S. Ct. 836, 3 A. L. R. (2d) 441, and *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, 73 Supreme Court 1031 cited by the

Defendants are not in point. In both of these cases, there had been a sale of real estate to a non-caucasian in violation of restrictive covenants. In the *Shelly* case, the Court held that the equity of court of the State could not be used against the non-caucasian to enforce the covenant. In the *Barrows* case, the court held that the covenant could not be enforced by an action at law for damages against the co-covenanter, who broke the covenant.

In both of these cases, there were willing sellers and willing purchasers. The purchasers paid their money and entered into possession. Having entered, they had a right to remain.

In the cases before the Court, there were no two willing parties to a contract. True, the Defendants wanted to buy, but the storekeeper did not want to sell and the Defendants had no right to remain after being asked to leave. A white person would not have the right to remain after being asked to leave either. In either case, a person would be a trespasser. The Constitutions provide for equal rights, not paramount rights.

I have only to pick up my current telephone directory and look in the yellow pages to find at least four establishments listed under "Restaurants" that advertise that they are for colored or for colored only.

To say that a white proprietor may not call upon a policeman to remove or arrest a Negro trespasser or a Negro proprietor cannot call upon a policeman to remove or arrest a white trespasser would lead to confusion, lawlessness and possible anarchy. Certainly, the Constitutions intended no such result.

The fundamental fallacy in the argument of Defendants is the classification of the stores and lunch counters as public places and the operations thereof as public carriers.

A person, whatever his color, enters a public place or carrier as a matter of right. The same person, whatever his color, enters a store or restaurant or lunch counter by invitation.

That person's right to remain in a public place depends upon the law of the land, and in a public carrier upon such law and such reasonable rules as the carrier may make, and, under the Constitution, neither the law nor rules may discriminate upon the basis of color.

On the other hand, the same person has no right to enter a store, a restaurant, or lunch counter unless and until invited, and may remain only so long as the invitation is extended. Whether he enters or remains depends solely upon the invitation of the storekeeper, who has a full choice in the matter. The operator can trade with whom he wills, or he can, at his own whim and pleasure, close up shop.

There is no question but that the Defendants are guilty. They were asked to leave and they refused. They, thereupon, were trespassers and such constituted a breach of the peace. In addition, Bouje admittedly resisted a lawful arrest.

The trespass statute (Section 16-386, as amended, Code of Laws of South Carolina, 1952) is not restricted to "pasture or open hunting lands" as Defendants argue. The statute specifically says "any other lands". In Webster's New International Dictionary, the definition of "land" in "Law" is as follows:

> "(a) any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc., and everything annexed to it, whether by nature, as trees, water, etc., or by man, as buildings, fences, etc., extending indefinitely vertically upwards and downwards. (b) An interest or estate in land; loosely any tenement or hereditament."

Order of the Richland County Court

The statute thus applies everywhere and without discrimination as to color. There is no question but that it was designed to keep peace and order in the community.

Since Defendants had notice that neither store would serve Negroes at their lunch counters, they were trespassers *ab initio*. Aside from this however, the law is that even though a person enter property of another by invitation, he becomes a trespasser after he has been asked to leave. *Shramek* v. *Walker, supra.*

For the reasons herein stated, I am of the opinion that the judgments and sentences of the Recorder should be sustained and the Appeals dismissed, and it is so *ordered.*

s/ JOHN W. CREWS,
Judge, Richland County Court.

Columbia, S. C.,
April 28, 1961.

Opinion of Supreme Court of South Carolina

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE CITY OF COLUMBIA,

Respondent,

—v.—

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Appellants.

Appeal From Richland County
John W. Crews, County Judge

Case No. 4777
Opinion No. 17857
Filed December 14, 1961

OXNER, A. J.: The five appellants, all Negroes, were convicted in the Municipal Court of the City of Columbia of trespass in violation of Section 16-386 of the 1952 Code, as amended, and of breach of the peace in violation of Section 15-909. Each defendant was sentenced to pay a fine of $100.00 or serve a period of thirty days in jail on each charge but $24.50 of the fine was suspended. From an order of the Richland County Court affirming their conviction, they have appealed.

The exceptions can better be understood after a review of the testimony. The charges grew out of a "sit-down" demonstration staged by appellants at the lunch counter

of the Taylor Street Pharmacy in the City of Columbia, a privately owned business. In addition to selling articles usually sold in drugstores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you "could have heard a pin drop in there", and that "everyone was on pins and needles, more or less, for fear that it could possibly lead to violence." He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch counter stated to them, "You might as well leave because I ain't going to serve you", which they did not construe as a specific request. They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: "Get up, we will get them out of here."

The questions involved are stated in appellants' brief as follows:

> "I. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4).
>
> "A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?
>
> "B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?
>
> "II. Did the State fail to establish the corpus delicti or prove a prima facie case? (Exceptions 1, 2)."

The questions designated I, A and B, must be decided adversely to appellants under City of Greenville v. Peter-

son, filed November 10, 1961, —— S. C. ——, —— S. E. (2d) ——, and City of Charleston v. Mitchell, filed December 13, 1961, —— S. C. ——, —— S. E. (2d) ——. Each of these cases involved a sit-down demonstration at a lunch counter in a privately owned place of business and the precise questions raised by Exceptions 3 and 4 in the instant case were raised in those cases and overruled. In the City of Charleston case we affirmed a conviction for violation of Section 16-386 as amended, which is the same section under which the appellants were convicted.

We think that Question II is based on exceptions too general to be considered. They are as follows:

> "1. The Court erred in refusing to hold that the City failed to prove a prima facie case.
>
> "2. The Court erred in refusing to hold that the City failed to establish the corpus delicti."

The foregoing exceptions do not comply with Rule 4, Section 6 of this Court. They do not point out in what respect the City failed to make out a prima facie case or to establish the corpus delicti. We do not know to which of the two offenses involved these exceptions are directed. We are not aided by appellants' brief. Only scant reference is there made to these two exceptions and apparently the position is taken that their determination is dependent upon the disposition of the other questions which we have held to be without merit.

It has been held that an exception to the effect that the judgment is contrary to the law and the evidence is too general to be considered. State v. Turner, 18 S. C. 103; State v. Cokley, 83 S. C. 197, 65 S. E. 174; State v. Davis, 121 S. C. 350, 113 S. E. 491. The same conclusion has been

reached with reference to an exception "that plaintiff failed to make out a case against defendant." Concrete Mix, Inc. v. James, 231 S. C. 416, 98 S. E. (2d) 841. Other pertinent cases are reviewed in Hewitt v. Reserve Life Insurance Co., 235 S. C. 201, 110 S. E. (2d) 852. It was pointed out in Brady v. Brady, 222 S. C. 242, 72 S. E. (2d) 193, that "every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."

In oral argument counsel for appellants raised the question of merger of the two offenses and argued that there could not be a conviction on both charges. But this question is not raised by any of the exceptions, is not referred to in the brief of appellants and, therefore, is not properly before us.

Affirmed.

TAYLOR, C.J., LEGGE, MOSS and LEWIS, JJ., concur.

IN THE

SUPREME COURT OF SOUTH CAROLINA

CITY OF COLUMBIA,

Respondent,

—against—

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE and JOHNNY CLARK,

Appellants.

Order of Denial of Petition for Rehearing

(Endorsed on back of Petition for Rehearing)

The within petition for rehearing is denied.

Filed: January 8, 1962.

s/ C. A. TAYLOR C. J.

s/ G. DEWEY OXNER A. J.

s/ LIONEL K. LEGGE A. J.

s/ JOSEPH R. MOSS A. J.

s/ J. WOODROW LEWIS A. J.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] #9 1963

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE AND JOHNNY CLARK, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE AND JOHNNY CLARK, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

We adopt as our Statement the summary of the proceedings in the Recorder's Court as given by Mr. Justice Oxner for the Supreme Court of South Carolina:

"The five appellants, all Negroes, were convicted in the Municipal Court of The City of Columbia of trespass in violation of Section 16-386 of the 1952 Code, as amended, and of breach of the peace in violation of Section 15-909. Each Defendant was sentenced to pay a fine of $100.00 or serve a period of thirty days in jail on each charge but

$24.50 of the fine was suspended. From an order of the Richland County Court affirming their conviction, they have appealed.

"The exceptions can better be understood after a review of the testimony. The charges grew out of a 'sit-down' demonstration staged by appellants at the lunch counter of the Taylor Street Pharmacy in The City of Columbia, a privately owned business. In addition to selling articles usually sold in drugstores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

"Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent any violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you 'could have heard a pin drop in there', and that 'everyone was on pins and needles, more or less, for fear that it could possibly lead to violence.' He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to

enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

"The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch counter stated to them, 'You might as well leave because I ain't going to serve you', which they did not construe as a specific request. They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: 'Get up, we will get them out of here.'"

REASONS FOR DENYING THE WRIT

I

The Petitioners Were Trespassers and Were Subject to Being Ejected or Arrested Without Violating Their Rights Under the Fourteenth Amendment.

This case does not come within the rule of *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. (2d) 207, 82 S. Ct. 248. Petitioners were "sit-ins" but they were not arrested for merely sitting or demonstrating. They were arrested only after the owner of the private lunch counter asked them to leave the premises and they failed or refused to do so. They were trespassers then, if not before, both under common and statutory law and were arrested and convicted as such.

The lunch counter was privately owned, was within a privately owned drugstore in a privately owned building on privately owned ground and was engaged purely in local

commerce. The rights and duties of the proprietor were like those of a restaurant not an inn. As stated in *Alpaugh v. Wolverton*, 36 S. E. (2d) 906, 184 Va. 943, "He [the proprietor] is under no common law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds."

Such proprietor violates no constitutional provisions if he makes a choice on the basis of color. *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. Ed. 747 (1960).

If petitioners had no right to be served, the proprietor could as he did here, ask them to leave and upon their refusal to comply with his request, they became trespassers. This has always been the law in South Carolina.

In *State v. Lazarus*, 1 Mill, Const. (8 S. C. Law) 31, (1817), the South Carolina Constitutional Court said: • • • "the prosecutor having business to transact with him [the defendant], had a right to enter his house and if he remained after having been ordered to depart, might have been put out of the house, the defendant using no more violence than was necessary to accomplish this object, and showing to the satisfaction of the court and judge, that this was his object."

In *Shramek v. Walker*, 152 S. C. 88, 149 S. E. 331 (1929), the Supreme Court of South Carolina quoted the rule as stated above in the *Lazarus case*, then quoted further with approval from 2 R. C. L., 559, as follows:

> "Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him."

Neither of the above cases involved questions of race.

In addition to becoming trespassers at common law, petitioners also violated Section 16-386 of the Code of Laws of South Carolina, 1952, as amended. The section was apparently first enacted in 1866. In the General Statutes of South Carolina (1882), it read as follows:

> "Sec. 2507. Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same shall be a misdemeanor."

An Amendment of 1883 left out the words "the enclosed or unenclosed" and added punishment by fine of not more than $100.00 or imprisonment of not more than 30 days, **1883 Acts, etc. of South Carolina (18)**, page 43.

An Amendment of 1898 made the posting and publishing of notice conclusive as to those making entry for hunting and fishing. **1898 Acts, etc. of South Carolina (22)**, page 811.

The Amendment of 1954 was tied in with an Amendment to Section 16-355 increasing the penalty for larceny of livestock and as such added the words "where any horse, mule, cow, hog or any livestock is pastured, or any other lands of another", eliminated the requirement for publishing the notice and changed the conclusiveness of notice from the purpose of hunting and fishing to that of trespassing. **1954 Acts, etc. of South Carolina (48)**, page 1705.

The section thus read at the time petitioners were arrested in 1960, as follows:

> "Sec. 16-386. Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog, or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county

> for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

The pertinent language, however, has remained the same for many years: "Every entry upon lands of another * * * after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor. * * *"

The South Carolina Supreme Court made no strained nor novel interpretation in applying the section to petitioners. In Webster's New International Dictionary (Second Edition) "land" as used in "law" is defined as follows:

> "a. Any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc. and everything annexed to it, whether by nature, as trees, water, etc., or by man as buildings, fences, etc., extending indefinitely vertically upwards and downwards.
>
> "b. An interest or estate in land, loosely, any tenement or hereditament."

And the South Carolina Supreme Court simply followed the common law rule as stated in the *Lazarus* and *Walker cases, supra,* in applying the rule that a person may become a trespasser by refusing to leave even though his entry may have been lawful. *City v. Mitchell,* filed Dec. 13 1961, ... S. C. ...., 123 S. E. (2d) 512.

II

The Decision of the Supreme Court of South Carolina Granted Petitioners All Rights to Freedom of Expression to Which They Were Entitled Under the Fourteenth Amendment to the Constitution of the United States.

There is no question but if a White man or a group of White men had gone into Taylor Street Pharmacy on the

day in question, had sat down, expecting service, had been told that they would not be served, and were further asked to leave but refused to do so, that they would have been guilty of violating Sec. 16-386 of the Code of Laws of South Carolina, 1952, as amended.

If Petitioners' argument is understood, however, Petitioners urge that because they were Negroes and the owners of the lunch counter White, their right to protest exceeded their right to be served.

Is the right to protest greater than the right to concur? The Fourteenth Amendment states simply and clearly that no State shall "deny to any person within its jurisdiction the **equal** protection of the laws."

The "freedoms" guaranteed by the Constitution do not give a person a license to stand in a prohibited place to protest where he could not have stood to concur. Rather, the Constitution guarantees that a person standing where he has a right to stand, shall not be **moved** from that place by the State because of his protest, if his protest is within the protection of the Constitution.

As a practical matter, however, Petitioners were permitted to give full range to their protest. As they state on pages 19 and 20 of their Petition for Writ of Certiorari:

> "Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner v. Louisiana, supra.* Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store

> which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions."

The owner told them that they would not be served and asked them to leave. It was only after they refused to comply with this request that they were arrested.

What more did petitioners want to do to express their protest? Continue to sit? For how long? Who decides when they shall leave?

This was not a street, private or otherwise, as was involved in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, where a person enters and stands as a matter of right but a private lunch counter in local commerce where a person enters and stands (or sits) upon invitation, express or implied, of the owner. The law decides how long a person has the right to remain on a street but the owner decides who shall remain in his store, and how long.

III

The Question of the Conviction of Petitioners for Breach of the Peace in Violation of Sect. 15-909 of the Code of Laws of South Carolina, 1952, in Addition to the Conviction for Trespass Under Section 16-386 of Said Code, Has Never Been Properly Raised.

As stated by the Supreme Court of South Carolina in this case, in the last paragraph of its opinion:

> "In oral argument counsel for appellants raised the question of merger of the two offenses and argued that there could not be a conviction on both charges. But this question is not raised by any of the exceptions, is not referred to in the brief of appellants and, therefore, is not properly before us."

CONCLUSION

In conclusion, it is respectfully submitted that the Supreme Court of South Carolina decided all federal questions of substance in the case in accordance with applicable decisions of this Court and the Petition for Writ of Certiorari should be denied.

All of which is respectfully submitted.

JOHN W. SHOLENBERGER,
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Columbia, S. C.,
Attorneys for Respondent.

Columbia, S. C.,
May 3, 1962.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 9

CHARLES F. BARR, *et al., Petitioners,*

—v.—

CITY OF COLUMBIA.

No. 10

SIMON BOUIE and TALMADGE J. NEAL, *Petitioners,*

—v.—

CITY OF COLUMBIA.

No. 12

ROBERT MACK BELL, *et al., Petitioners,*

—v.—

MARYLAND.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1963

No. 9

CHARLES F. BARR, *et al.*,

Petitioners,

—v.—

CITY OF COLUMBIA.

No. 10

SIMON BOUIE and TALMADGE J. NEAL,

Petitioners,

—v.—

CITY OF COLUMBIA.

No. 12

ROBERT MACK BELL, *et al.*,

Petitioners,

—v.—

MARYLAND.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PETITIONERS

Opinions Below

1: *Barr* v. *Columbia.* The opinion of the Supreme Court of South Carolina (R. Barr 53) is reported at 239 S. C.

395, 123 S. E. 2d 521 (Dec. 14, 1961). The opinion of the Richland County Court, April 28, 1961, is unreported (R. Barr 46). The oral opinion of the Columbia Recorder's Court, March 30, 1960, is unreported (R. Barr 41).

2. *Bouie* v. *Columbia.* The opinion of the Supreme Court of South Carolina (R. Bouie 64) is reported at 239 S. C. 570, 124 S. E. 2d 332 (Feb. 13, 1962). The opinion of the Richland County Court, April 28, 1961, is unreported (R. Bouie 57). The oral opinion of the Columbia Recorder's Court, March 25, 1960, is unreported (R. Bouie 50).

3. *Bell* v. *Maryland.* The opinion of the Court of Appeals of Maryland (R. Bell 10) is reported at 227 Md. 302, 176 A. 2d 771 (Jan. 9, 1962). The Memorandum Opinion of the Criminal Court of Baltimore, March 24, 1961, is unreported (R. Bell 6).

Jurisdiction

1. *Barr* v. *Columbia.* The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered January 8, 1962 (R. Barr 59). The petition for certiorari was filed April 7, 1962, and granted June 10, 1963 (R. Barr 63).

2. *Bouie* v. *Columbia.* The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered March 7, 1962 (R. Bouie 69). The petition for certiorari was filed June 5, 1962, and granted June 10, 1963 (R. Bouie 73).

3. *Bell* v. *Maryland.* The judgment of the Supreme Court of Maryland was entered January 9, 1962 (R. Bell 12). On April 6, 1962, Mr. Justice Black extended the time for filing a petition for writ of certiorari to and including June 8, 1962 (R. Bell 62). The petition was filed on that date and was granted June 10, 1963 (R. Bell 62).

The jurisdiction of this Court in each of these cases is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here the denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Statutory and Constitutional Provisions Involved

I. Each of these cases involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II. Statutes:

A. *Barr* v. *Columbia*—petitioners were convicted under the following statutes:

1. Code of Laws of South Carolina, 1952, Section 16-386, as amended:

> §16-386. *Entry on lands of another after notice—prohibiting same.*—Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

2. Code of Laws of South Carolina, 1952, Section 15-909:

> §15-909. *Disorderly conduct, etc.*—The mayor or intendant and any alderman, councilman or warden of any city or town in this State may, in person, arrest, or may authorize and require any marshal or

constable especially appointed for that purpose to arrest, any person who, within the corporate limits of such city or town, may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. Upon conviction before the mayor or intendant or city or town council, such person may be committed to the guardhouse which the mayor or intendant or city or town council is authorized to establish or to the county jail or to the county chain gang for a term not exceeding thirty days and if such conviction be for disorderly conduct such person may also be fined not exceeding one hundred dollars, *provided*, that this section shall not be construed to prevent trial by jury.

B. *Bouie* v. *Columbia*—petitioners were convicted under Code of Laws of South Carolina, 1952, Section 16-386, as amended, quoted *supra*.

C. *Bell* v. *Maryland*—petitioners were convicted under Annotated Code of the Public General Laws of Maryland, 1957, Article 27, §577, appearing at Volume 3, p. 234:

Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined by said justice of the peace not less than one, nor more than one hundred dollars, and shall stand committed to the jail of the county or city until such fine and costs are paid; provided, however, that the person or persons so convicted shall have the

right to appeal from the judgment of said justice of the peace to the circuit court for the county or city or Criminal Court of Baltimore where such trespass was committed, at any time within ten days after such judgment was rendered; and, provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim or right or ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others.

Questions Presented

I.

Were petitioners' rights under the Fourteenth Amendment violated by conviction of crimes for having remained in luncheonette or restaurant seats in disregard of the proprietors' racially discriminatory orders that they leave, where the states have used their judicial machinery to enforce racial discrimination, where the discrimination was caused at least in part by a segregation custom substantially supported by state laws, and where the states' regimes of laws have failed to protect petitioners' claim to equality by subordinating it to a narrow and technical claim of property right to racially discriminate in places of public accommodation?

II.

Were petitioners denied due process under the Fourteenth Amendment in that their convictions under S. C. Code §16-386 and Md. Code Art. 27, §577 were either based upon no evidence or the laws as applied failed to furnish any fair warning as to the conduct prohibited?

III.

A. Were petitioners in *Barr* v. *Columbia* deprived of rights under the Fourteenth Amendment where, in addition to the other measures of state involvement mentioned above, the racial discrimination against them was the product of police collaboration in "requesting" that the proprietor ask them to leave the lunch counter?

B. Were petitioners in *Barr* v. *Columbia* denied due process by their convictions for breach of the peace where either the convictions were based upon no evidence or the law as applied failed to furnish any fair warning as to the conduct prohibited?

Statement

1. *Barr* v. *Columbia*

Petitioners, five Negro college students, were convicted of the crimes of entry on lands of another after notice prohibiting such entry (S. C. Code §16-386) and breach of the peace (S. C. Code §15-909) in the Recorder's Court of Columbia, South Carolina, at a non-jury trial held March 30, 1960 (R. Barr 53).

Four witnesses testified at the trial. The City's witnesses were Carl Stokes, a State Law Enforcement Division (SLED) officer, and John Terry, co-owner and manager of the Taylor Street Pharmacy in Columbia where petitioners were arrested. The City's witnesses gave the following version of what happened on March 15, 1960, leading to the arrests.

Mr. Stokes, and two local officers were ordered to go to the Taylor Street Pharmacy, and they arrived there at about 10:30 A.M. (R. Barr 2-3); the police had information that a "sit-down demonstration" was to occur there (*id.*, 3, 6). The manager Terry had been alerted by the police on the previous day that a demonstration was planned for

12:35 A.M. (*id.*, 20-21). At about that hour the petitioners entered the store (*id.*, 3). When they entered a couple of them stopped at the card counter (*id.*, 3, 7), then all proceeded to the lunch counter in the rear and took seats—four at one counter and one at another (*id.*, 3). Stokes and the co-owner Terry followed them to the rear, and when they sat down Terry stated to the group that "he wasn't going to serve them, that they would have to leave" (*id.*, 4, 17); petitioners did not respond to this (*id.*, 17). (It is clear that Mr. Terry said nothing to them before they sat down (*id.*, 12)). Several white customers seated at the counter continued to sit; it was said that one white lady "jumped up, or stood up" (*id.*, 12). After Terry's statement, SLED agent Stokes said he "requested that Mr. Terry go to each individual and ask him to leave, in my presence, and he went to each one and asked him to leave, that he wasn't going to serve them," and he added that "each one turned and looked at him but they never said anything" (*id.*, 4). At this point agent Stokes said that petitioner Carter got up and "asked Mr. Terry if he could ask him a question"; Mr. Terry said that he had no comment to make, that they would have to leave" (*id.*, 4). Stokes said that when Carter stood up the other petitioners did, but then Carter "motioned for them to sit back down and they sat back down and sat there" (*id.*, 4). After "several minutes," Stokes said he told them that he was a State officer and "they had been asked to leave and they didn't so they were under arrest" (*id.*, 4-5). Petitioners then followed the officers out of the store and were taken to police headquarters.

Mr. Terry's version was substantially the same as Agent Stokes' (*id.*, 17). He testified that the store's policy was not to serve Negroes at the lunch department (*id.*, 17); but that he catered to the public generally irrespective of race in the front of the store, i.e., all areas except the lunch counter; and that he had "quite large numbers" of Negroes trading in the store (*id.*, 18-19). He said Negroes can come

into the luncheonette to receive "food service to go" (*id.*, 19). Terry said that he had a sign in the luncheonette saying that he "can refuse service to anyone" (*id.*, 20); there was no mention of any sign explicitly barring Negroes. Terry acknowledged that the store was advertised as a complete department store, and volunteered that "we have two City licenses . . . the luncheonette is one and the front area is another" (*id.*, 18).

When asked if he asked the police to arrest petitioners when they ignored his direction to leave, Terry said, "We [the police and himself] had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing" (*id.*, 23), and later:

> Q. Was it your idea to have these defendants arrested, or was it the idea of the police department?
>
> A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested (*id.*, 24).

Stokes testified that before petitioners arrived Terry had told him "that if they came, he wasn't going to serve them" (*id.*, 9). Terry acknowledged that petitioners did not interfere with anyone in the store, were generally orderly, were neatly dressed, and that their appearance was generally that of any other customer except for their color (*id.*, 22). He agreed that his only reason for not serving them was the fact that they sat down and the fact that they were Negroes (*id.*, 23); and expressed the view that their sitting down "created a disturbance" and that "everyone was on pins and needles, more or less, for fear it could possibly lead to violence" (*id.*, 24). Mr. Stokes said that his purpose in being there was to prevent violence; that none occurred; and that "the only incident that I figured violence might come from was when they sat down and the customers stood up, and I didn't know what was going

to come off. I couldn't read their minds or anyone else's in fact" (*id.*, 13).

The account of the events given by petitioners David Carter (*id.*, 27-30) and Richard M. Counts (*id.*, 31-37) radically contradicted the City's witnesses on numerous points; some are indicated below.[1] Messrs. Carter and Counts both stated that they thought they had a right to be there, and that they wanted to be served (*id.*, 25, 28, 31, 37). On cross-examination Mr. Carter said: "I did not go with the idea of being arrested, but I had been promised that I would have equal protection in that store or any other store" (*id.*, 28). Carter's explanation of this was cut off by the Court sustaining the prosecutor's objection of "hearsay"; on cross (R. Barr 28):

> Q. Who promised you that?
>
> A. The City Manager. There were five of us went down to City Hall.
>
> Q. He promised you?
>
> A. Listen to me now. Five of us went to the City Hall one day to see the Mayor. The Mayor was not in. We then talked with the City Manager, who was very polite to us. He said to us: *"Gentlemen, further demonstrations will not be tolerated."* We said: "Mr. McNayr, what would you do to stop such demonstrations?" He said to us: "If you are going to go down, I don't object to nobody—." (Emphasis supplied.)

[1] For example, both Messrs. Carter and Counts denied that Terry asked them to leave (R. Barr 29, 35); both said that another store employee—possibly the luncheonette manager—spoke to them and said as Carter recalled it, "You might as well leave because I ain't going to serve you" (R. Barr 26, 34). Carter said that he stood up, tried to ask the luncheonette manager a question, but Terry said, "No, don't answer him"; that Counts also stood up; that he motioned to the other three petitioners and told them to sit until someone asked them to leave; and that he had turned to walk away when he was stopped by a deputy (R. Barr 26). Counts also said he stood up and walked to the exit, and then the deputy sheriff told him that he was under arrest (R. Barr 33).

Mr. Sholenberger: This is all hearsay, your Honor.

The Court: I'm going to strike that out. You see, you have to answer counsel's questions.

A. I'm answering his questions—

The Court: We don't want any speech here. We're not going to tolerate any great big speech.

Mr. Jenkins: Your Honor, I want the record to show that counsel opened the door for this type of testimony.

The Court: He didn't open the door for any hearsay testimony. I'm going to rule hearsay testimony out, definitely. I rule it out right now. Ask him the questions.

At the conclusion of the trial the Court found petitioners guilty as charged, and sentenced them to pay $100 on each charge, or serve 30 days in jail on each charge, provided that $24.50 was suspended on each charge (*id.*, 1). Before and after the verdict petitioners made motions objecting that the convictions would, and did, violate their rights under the due process and equal protection clauses of the Fourteenth Amendment (*id.*, 38-40; 42-45). The convictions were affirmed by the Richland County Court and the Supreme Court of South Carolina (*id.*, 46, 53).

2. *Bouie v. Columbia*

Petitioners Bouie and Neal, Negro college students, were convicted of the crime of entry on the lands of another after notice prohibiting the same (S. C. Code §16-386; R. Bouie 65). (They were charged, but not convicted of breach of the peace. Bouie's conviction for resisting arrest was reversed on appeal.) The trials were held March 25, 1960, in the Recorder's Court of the City of Columbia, South Carolina, without a jury. The State called two witnesses, Shep A. Griffith, Assistant Chief of Police in Columbia,

who made the arrests, and an officer who examined petitioners' possessions at the police station. Petitioners called Dr. Guy Malone, manager of Eckerd's Drug Store in Columbia, where they were arrested. Both also testified in their own defense.

Eckerd's Drug Store in Columbia is a rather large store, with numerous departments including a luncheonette area; it is a part of a chain of similar establishments located in different southern states (R. Bouie 24). The manager Malone testified that the general public, including Negroes, is invited to do business at Eckerd's, except that Negroes are not served at the lunch counter department which is for whites only (*id.*).[1]

Petitioners entered Eckerd's around 11:05 A.M. on March 14, 1960, went to the rear lunch area and sat in the first booth (R. Bouie 25, 28, 29). They had books, and sat reading them for about fifteen minutes, during which no store employee approached them to take their order, because as Dr. Malone put it, "we didn't want to serve them." While acknowledging Eckerd's policy of not serving Negroes at the lunch area, Dr. Malone denied that he *refused* to serve them because they were Negroes; this is perhaps explainable by Malone's subsequent[2] statement that he "didn't do anything" (*id.*, 25-26),[3] and thus never

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[1] There was no evidence of a sign announcing this policy in the store. The City's witnesses did not mention it, but Neal testified that after he and Bouie took seats a salesman came up with a "No Trespassing" sign on a chain in his hands and put it up (R. Bouie 29).

[2] The testimony (R. Bouie 25-26) was:

Q. Did anyone seek to take the orders of these young men?
A. No, they did not.
Q. Why did they not do so?
A. Because we didn't want to serve them.
Q. Why did you not want to serve them?
A. I don't think I have to answer that.
Q. Did you refuse to serve them because they were Negroes?
A. No.

affirmatively told them he wouldn't serve them. Dr. Malone did call the City police and ask that these young men be removed (*id.*, 26).

Assistant Chief of Police Griffith and a police detective responded to a call that there was "some disturbance" at Eckerd's (*id.*, 3). In Griffith's words (*id.*, 3-4):

> A. Well, Detective Slatterer and I went there as a call to Headquarters that there was some disturbance in Eckerd's Drug Store. When we arrived, Mr. Malone, who is the Manager, went back to the booth. He met us about halfway up the store and he went back to a booth with the two defendants Neal and the other boy, Bouie, and he said: "Now, you have served your purpose and I want you out, because we aren't going to serve you" and they sat there just ignoring him, so to speak, kept reading or looking down at something, whether they were reading or not, and he said: "I'm asking you the second time to get on out." That was in my presence, so then I told them both that the Manager wanted them out and they should go on out, and this boy on the other side there, Bouie, said: "For what?" I said: "Because it's a breach of the peace and I'm telling you the second time to go on out." He said: "Well, I asked you for what?" So at that time I reached and got him by the

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Q. You did say, however, that Eckerd's has the policy of not serving Negroes in the lunch counter section?
A. I would say that all stores do the same thing.
Q. We're speaking specifically of Eckerd's?
A. Yes.
Q. Did you or any of your employees, Mr. Malone, approach these defendants and take their order for food?
A. No.

The Court: He testified to that awhile ago.

Q. What, if anything, did you do?
A. I didn't do anything.
Q. Did any of your employees do anything?
A. No."

> arm. Neal here had started to make an effort to get up but the other boy had not, and I had to pull him up out of the seat, so I stood them up and made a preliminary frisk, which we usually do to see if they had any weapons on them and I found none. Then I caught him in the belt, his belt and his breeches.

Chief Griffith said that when he arrived the only reason Malone gave for calling him was: "He said there were two colored boys back there in the seat and refused to move, yes sir" (*id.*, 5); he made clear that when he arrived the petitioners were just sitting in the booth reading (*id.*, 8). The Chief said that there were no other persons seated in the food area when he arrived (*id.*, 11); but there was a group of people "standing there completely idle, watching" (*id.*, 10). Chief Griffith declined to say how much time elapsed after his second request to Bouie to leave before he lifted him out of the seat except that it was "enough time for him to get up" (*id.*, 13).

The Chief described Eckerd's as "a public place," generally patronized by the public (*id.*, 16-17), and expressed no doubt as to why he was called to arrest petitioners. On cross he was asked if this was "because they were Negroes who were asking for food service in the food department in Eckerd's Drug Store, and the manager was directing them out because they were Negroes?" and he responded: "Why, certainly, I would think that would be the case" (*id.*, 17).

Petitioners were sentenced to pay fines of $100 or serve thirty days in jail, $24.50 being suspended (*id.*, 1).

Petitioners made motions raising Fourteenth Amendment due process and equal protection objections at the end of the State's case, at the close of the trial, and after the trial (*id.*, 20, 49-50, 51-57). On appeal the convictions under S. C. Code §16-386 were affirmed by the Richland County Court and the State Supreme Court (*id.*, 57, 64).

3. *Bell* v. *Maryland*

Petitioners, twelve Negro students, were charged and convicted of violating Article 27, §577 of the Maryland Code, as a result of their participation in a "sit-in" demonstration in a Baltimore, Maryland restaurant on June 17, 1960. Petitioners were indicted by the Baltimore City grand jury, in a two-count indictment dated July 12, 1960 (R. Bell 14-15). They were found not guilty on count two, and guilty on count one (*id.*, 9), which charged that the twelve petitioners:

> . . . on the seventeenth day of June, in the year of our Lord nineteen hundred and sixty, at the City aforesaid, unlawfully did enter upon and cross over the land, premises and private property of a certain corporation in this State, to wit, Hooper Food Co., Inc., a corporation, after having been duly notified by Albert Warfel, who was then and there the servant and agent for Hooper Food Co., Inc., a corporation, not to do so; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State (*id.*, 14).

At the trial, held in the Criminal Court of Baltimore without a jury on November 10, 1960, the following evidence was presented. On Friday, June 17, 1960, at about 4:15 or 4:20 P.M., a group of 15 or 18 Negro students, including petitioners, entered the lobby of Hooper's Restaurant (*id.*, 23). They were met at the topmost of four stairs leading from the lobby to the dining room by Miss Dunlap, the hostess (*ibid.*). When one asked to be seated, Miss Dunlap said, "I'm sorry, but we haven't integrated as yet" (*ibid.*). The restaurant manager, Albert Warfel, came to where Miss Dunlap was standing and began to talk to one of the petitioners, John Quarles (*id.*, 24, 27). Warfel said:

> . . . It has been stated, it had been stated to me company policy, we're not, we have not integrated the restaurant. I so notified— First I asked the leader of the group, which I wanted to get it centralized. I spoke to him [Quarles]. I told him the company policy (*id.*, 27).

Warfel continued:

> "Well, while in the process of translating the company policy, the group broke. They brushed by us and sat at various tables in the restaurant. After they were seated they proceeded to hedgehop" [spread out to various tables] (*id.*, 27-28).

Mr. Hooper, owner of the corporation operating the establishment, arrived at this point and instructed Warfel to summon the police (*id.*, 28). Police Sgt. Sauer and Lt. Redding were in the area and were called over by Warfel; when they went inside they found the group of colored people, including petitioners sitting around at different tables (*id.*, 38-39). Warfel read Article 27, §577 of the Maryland Code to the petitioners, and then requested that they leave (*id.*, 39). Some of the group had apparently not entered the upstairs dining room, but had gone into the downstairs grill area (*id.*, 43, 52). Sgt. Sauer said that "After reading the ordinance upstairs we went down to the basement restaurant which is more or less of a cafeteria arrangement and the same thing followed down there (*id.*, 39). At this point some of the Negroes left and the others' names were taken down (*id.*, 39, 29); Hooper went to a magistrate's office and secured warrants for those who remained. Petitioners were not placed in custody—it was arranged by phone that they would appear in court on the following Monday (*id.*, 39-40). When Sgt. Sauer returned they had left the restaurant (*id.*, 40).

Mr. Warfel made it clear that the petitioners were refused service solely on the basis of their color (*id.*, 30).

Mr. Hooper said he was aware of the aim of the demonstration as other such demonstrations had occurred in his restaurant (*id.*, 32); that he was "in sympathy" with the demonstrators' "objectives" but disapproved their methods (*id.*, 32-33); and that he told Mr. Quarles that he "felt personally that it was an insult to human dignity" and he sympathized but that "customers govern my policy" (*id.*, 37).

Mr. Quarles also testified as to this conversation, including Hooper's statement that his policy was as it was because his "customers don't want to eat with Negroes," and his explanation to Hooper that "we were there to be served and also to let his customers become aware of the problem of segregation in Baltimore City," and that "we were not there to interrupt his business and we were not there to distort or destroy his business. We were simply there seeking service as humans and also as citizens of the United States of America" (*id.*, 43-44).

Defendants filed a motion raising Fourteenth Amendment due process and equal protection objections including free speech and association, and racial discrimination claims, during and after the trial (*id.*, 4-5, 41, 60). Their constitutional defenses were rejected by the trial court and on appeal. The trial court's opinion was rendered on March 24, 1961 (*id.*, 6), and petitioners were sentenced on that day to fines of ten dollars, which were suspended, because of the Court's views that "these people are not law-breaking people; . . . their action was one of principle rather than any intentional attempt to violate the law," and "they did not intend to deliberately violate the law but were seeking to establish a principle" (*id.*, 9-10). The Maryland Court of Appeals affirmed, rejecting petitioners' constitutional arguments by citing its decisions in *Drews* v. *State*, 224 Md. 186, 167 A. 2d 341 (1961), and *Griffin & Green* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961) (*id.*, 10-12).

Summary of Argument

I.

Petitioners' convictions enforce racial discrimination in violation of the Fourteenth Amendment. The records clearly show racial discrimination. The states are constitutionally responsible for the discriminations under three related theories urged by petitioners. First, the use of state judicial machinery to convict petitioners of a crime is a use of state power in the Fourteenth Amendment sense. *Shelley* v. *Kraemer*, 334 U. S. 1, is applicable, and cannot properly be distinguished. Second, state action is involved because the acts of discrimination were causally related, at least in part, to a segregation custom which law has substantially supported. State action is causally traceable into the discrimination; all the evidence tends to show this. The States have not shown the contrary, and the burden of proving otherwise should rest on them in the circumstances of the cases. Finally, state power is involved to a significant degree in that the states' regimes of laws fail to furnish protection to petitioners by subordinating their claimed right to equality to a narrow and technical property claim. The states' role is not neutral; they have preferred the discriminator's insubstantial property claim to the petitioners' claim of equality. The Fourteenth Amendment overrides this state choice, for equal protection of the laws requires the states to protect the claim of equality in such circumstances. A part of the holding in the *Civil Rights Cases*, 109 U. S. 3, should be discarded; the holding that the Fourteenth Amendment applies only where government is involved is not challenged.

The theories of "state action" urged above may rationally be limited in their incidence by an interpretation of the substantive meaning of the equal protection clause, which recognizes other constitutional demands. Thus, the personal

and private life of individuals need not be subjected to Fourteenth Amendment norms. Petitioners do not urge that no state action is needed under the Fourteenth Amendment, but rather, that because it is usually present a substantive rule applying the equal protection clause to the "public life" of the community is needed to do some of the work that the state action concept is wanted for but cannot do.

II.

The convictions under S. C. Code §16-386 and Md. Code Art. 27, §577, deny due process because there was no evidence of the conduct proscribed, or else the laws as applied fail to furnish fair warning. Both statutes provide against entry after notice not to do so; these records clearly show petitioners were arrested for failures to leave premises they were already on following demands to leave. Only a fiat of construction could apply these laws to petitioners' acts.

III.

Additional grounds require reversal in *Barr* v. *Columbia*. First, the records show police involvement in "working with" the proprietor to effect the discrimination against petitioners; the policeman even "*requested*" the store manager to ask petitioners to leave. This is an active use of state machinery, power, and influence in support of and initiation of discrimination. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267, and *Peterson* v. *Greenville*, 373 U. S. 244.

In addition to the grounds stated above, the breach of the peace convictions may be reversed on the ground that there was either no evidence of guilt or South Carolina's crime breach of the peace is so indefinite as to violate the rule of *Edwards* v. *South Carolina*, 372 U. S. 229, and other similar cases.

ARGUMENT

I.

Petitioners' Convictions Enforce Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

A. *The convictions enforced racial discrimination against petitioners.*

Indisputably, petitioners' convictions in each of these cases (including the breach of the peace convictions in *Barr*) rest upon and constitute racial discriminations against them. In each case petitioners are Negro students who sat at food service counters and tables insisting upon service which was refused pursuant to the establishments' racially exclusionary policies.

In the *Bell* case petitioners took seats at tables in Hooper's Restaurant on June 17, 1960. Hooper's maintained a policy of excluding Negroes (R. Bell 29). The restaurant manager, Albert Warfel, whose direction petitioners were charged with disobeying (R. Bell 3), directly acknowledged that they "were refused service solely on the basis of their color" (R. Bell 30), and "for no other reason" (*id.*). Indeed, it was stipulated that petitioners "refused to leave at that time after being refused service because of their race . . ." (R. Bell 40).

In the *Barr* case petitioners took seats at a lunch counter in the Taylor Street Pharmacy on March 16, 1960, and were refused service and ordered to leave because they were Negroes (R. Barr 23). It was the policy of the Taylor Street Pharmacy not to serve Negroes in the lunch department (R. Barr 17).

In the *Bouie* case petitioners sat in a luncheonette booth at Eckerd's Drug Store on March 14, 1960. Eckerd's welcomed Negroes as customers in all its departments except the lunch counter which, by the management's policy, was "closed to members of the Negro public" (R. Bouie 24). The manager, Mr. Malone, acknowledged this policy of not serving Negroes and said that no employee took petitioners' food orders "because we didn't want to serve them" (R. Bouie 26). Strangely, at one point Malone refused to answer "why" he did not want to serve them and denied that he *"refused"* them service because they were Negroes (R. Bouie 26). This is on its face interpretable as an assertion that he did not expressly "refuse" service; he immediately afterwards said "I didn't do anything" (*id.*). Other things in the record amply confirm that the exclusion was purely racial. The policy of not serving Negroes was expressly admitted (R. Bouie 24); nothing in the record about petitioners' conduct, dress, demeanor, or anything else even suggests any nonracial basis for the exclusion; the arresting officer readily acknowledged that race was the reason the manager called him and ordered petitioners from the store:

> Q. Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?
>
> A. Why certainly, I would think that would be the case (R. Bouie 17).

The arresting officer said that the only reason Malone gave for calling him was that "there were two colored boys back there in the seat and refused to move . . . " (R. Bouie 5).

The several South Carolina courts proceeded to decide the case on express or implied assumptions that race was the basis for the exclusion,[4] and, indeed, the arguments made in the State's Brief In Opposition to Certiorari *In Bouie* seem to rest on the same premise.[5]

Clearly, then, all three of these cases involve discrimination based on color, "simply that and nothing more" (*Buchanan* v. *Warley*, 245 U. S. 60, 73), and it is no longer arguable that such discriminations by government are valid. Racial discriminations have been held repeatedly to violate the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1; *Goss* v. *Board of Education*, 373 U. S. 683; *Peterson* v. *Greenville*, 373 U. S. 244; cf. *Colorado Com.* v. *Continental Airlines*, 372 U. S. 714.

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[4] The trial court's oral ruling cited *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959), a racial discrimination case, to support its view that "any business has a right to serve anybody and to refuse to serve anybody, be they white or colored" (R. Bouie 21-22; cf. R. Bouie 51). The intermediate tribunal, the Richland County Court, held that petitioners in this and a companion case were "trespassers *ab initio*" because they "had notice that neither store would serve Negroes at their lunch counters" (R. Bouie 62), having previously said that ". . . the proprietor can choose his customers on the basis of color without violating constitutional provisions" (R. Bouie 59). The Supreme Court of South Carolina rejected petitioners' Fourteenth Amendment defenses merely by citing its prior decisions which held that the operators of privately owned lunch counters could racially discriminate and that the Fourteenth Amendment was no bar to trespass prosecutions in such cases (R. Bouie 66).

[5] The brief argues: "Such proprietor violates no constitutional provision if he makes a choice on the basis of color." (Brief in Opposition to Certiorari, p. 3.)

B. *The employment of the state judicial machinery (in association with police and prosecutors) to sanction and enforce the racial discrimination here shown, constituted a use of state power within the sense of the Fourteenth Amendment.*

There are a number of elements of state involvement in these cases. These elements are complexly interrelated. The "state action" issue need not turn on any one of them in isolation, but may be resolved by consideration of their interrelation; this is not a matter of softening the focus but of widening the angle of vision. Nevertheless, analytic clarity requires separate consideration of the several modes of "state action" here found.

Petitioners first invoke, as clearly applicable, the doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1. Unless that case is to be overruled (or, what is the same thing, irrationally "confined to its own facts"), it is settled law that there are some cases in which the "state action" requisite for invocation of the Fourteenth Amendment is to be found in the use of the judicial power to enforce a privately-originated scheme of racial discrimination.

It is unthinkable that *Shelley* is to be overruled. It has been followed[6] and approvingly cited in this Court.[7] It is unlikely that there is now much disagreement with its broader principle; who, for example, would now think it right to uphold the action of a state court in ordering specific performance, by one restaurateur who wanted to desegregate, of an agreement among all the restaurateurs in a town to retain segregation? Yet such an injunction,

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[6] *Trustees of the Monroe Avenue Church of Christ* v. *Perkins*, 334 U. S. 813 (1948).
Barrows v. *Jackson*, 346 U. S. 249 (1953).

[7] *Hurd* v. *Hodge*, 334 U. S. 24, 33 (1948).
Cooper v. *Aaron*, 358 U. S. 1, 17 (1958).

absent the Fourteenth Amendment, would be well within the equity categories governing the administration of the private-law remedy of specific performance, as a state might choose to develop them.

As Professor Henkin, one of the most thoughtful analysts of *Shelley* has said: "*Shelley* v. *Kraemer* was not wrongly decided. It is not a special case. It need not be rejected; it need not be narrowly limited." Henkin, "*Shelley* v. *Kraemer*: Notes For A Revised Opinion," 110 U. Pa. L. Rev. 473, 491 (1962).

But if the *Shelley* principle has living force, it is hard to see why it should not apply here. These cases are stronger than *Shelley*. In *Shelley*, the state action immediately involved consisted (aside from the furnishing of recordation machinery) in keeping the courts open for the filing of complaints that asked injunctive relief, in granting such relief when asked by a private party, and in standing by with the contempt machinery for use in the event the private party might invoke that machinery. In these cases, the police were either present in advance to assist the proprietor in maintaining racial discrimination or acted as formal witnesses to the warning, or both. (In the *Barr* case, the collaboration of police went much further, and furnishes an independent ground for reversal there; see Part III-A, *infra*.) The public prosecutor, supported by the public fisc, carried the cases to court. Most crucially, the cases were criminal prosecutions, in which the state appears as a party, *in its own interest*, in knowing support of the discriminatory scheme, which it thereby sanctions within the public order of its criminal law, and not merely within the framework of its dealing with private rights. The States of Maryland and South Carolina have taken on these cases as their own from the first policeman's warning to the last argument in this Court; it must be a

paradoxical distinction indeed which could find "state action" in the private-law umpiring performed by the state in *Shelley* v. *Kraemer*, and not find it here.

Suggested distinctions, isolating these cases from *Shelley*, make no sense. The South Carolina court, in its opinion in *Barr* (R. 49) stressed that *Shelley* involved a willing purchaser and a willing buyer; but that distinction ignores the complaining party in *Shelley*, the covenantee who was most unwilling to lose the benefit of his covenant, and who nevertheless was told that the Fourteenth Amendment forbade its judicial enforcement. The suit in *Shelley* was brought by a man asserting his own contractual and property right to discriminate with respect to the race of his neighbors. The principal relief asked of and granted by the state courts was the exclusion of a Negro from a house on the application of the very person who claimed a contractual and property right to exclude him from that house. *Shelley* did not primarily, if at all, involve a state court attempt to force a seller to discriminate, but was an attempt at implementing a right to discriminate claimed by the plaintiff.[8]

It has been urged that *Shelley* involved contract rights, while these cases involve property rights; but this distinction, aside from its obvious unviability in the robust air of a constitutional context, is not even descriptively accurate, for the covenant that runs with the land creates a kind of property interest, described in the state court's opinion in a companion case to *Shelley*, as "reciprocal negative easements."[9] Substantially, the right asserted in *Shelley* was more weighty than that asserted here; if one

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[8] While the straw grantor was a nominal defendant in *Shelley*, in *McGhee* v. *Sipes*, the companion case, the Negro owners were the only defendants.

[9] See record in U. S. Supreme Court in *McGhee* v. *Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51.

really dislikes Negroes, having a Negro as a next-door neighbor is more disagreeable than selling a Negro a sandwich—or, more accurately, having to endure his sitting and ordering a sandwich.

It is asserted that the state is not enforcing racial discrimination, but implementing a property right. The distinction is a false one; the state is enforcing racial discrimination *by* implementing a property right, just as in *Shelley* the state was enforcing racial discrimination by implementing a contract right which was also a property right.

The suggested distinctions totally fail, and "state action" is to be found here squarely on the authority of *Shelley* v. *Kraemer*, as well as by application of the sound principle it illustrates. It is recognized that the thoroughgoing acceptance of the *Shelley* principle might, unless means of rational limitations are available, threaten the invasion of those purely private objects of human life. Petitioners intend, in Part I-E, *infra*, to suggest to the Court readily available means for preventing this result, by interpretation of the substantive guarantees of the Fourteenth Amendment.

C. *The state is involved in the acts of racial discrimination sanctioned in these cases, since they were performed in obedience to a widespread custom, which in turn has been confirmed and maintained by state law.*

The petitioners' substantive contention here rests on nothing more farfetched than the proposition that the formal acts of the state are to be traced to their natural and probable consequences. The submission is that, where the individual act of segregation is performed substantially under the influence of a widespread public custom of segregation, and where this widespread public custom has in

turn been substantially supported by formal state law, then the act of segregation is infected with state power. This proposition seems little more than a corollary of the obvious truth that the state acts when its formal exertion of power is causally traceable into the act complained of.

The unfolding of this proposition requires a few words.

First, its submission is that where the causal connection of the segregation with custom is *substantial*, and not only where that connection amounts to practical coercion, the required nexus is present; similarly, where state la- has *substantially* supported the custom of segregation, and not only where it is the sole force behind that custom, state action is traceable in the custom. These propositions are conformed to the *Civil Rights Cases* statement that "some" state action is enough (109 U. S. 3, 13) as well as with the "significant extent" criterion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715,\722, and will not seem *sui generis* to anyone familiar with the ordinary rule as to the liability of joint tort-feasors, or with other similar rules in the common law.

Secondly, there is no principled reason for finding state action only in those cases where state law presently in force supports the segregation custom; states, like men, are to be charged with the consequences of what they do, even when those consequences follow after the act that produced them is finished, or even repented. The maintenance for generations of a *de jure* segregated regime has its consequences after the laws are changed, and the rules of "state action" ought to give effect to this obvious social truth. The purpose of tracing out this chain of causation is not the penalization of the present state officials, but the resolution of the issue whether in fact state power is a substantial factor in the discrimination complained of.

Thirdly, it is not dispositive of the question of the causal nexus between state law and state custom to show that the segregation code of the state did not contain a provision specifically commanding the very sort of segregation involved in the case. A reasonably comprehensive segregation code surely contributes to some extent to the likelihood that segregation will be observed as a general custom even where that code does not specifically command it.

It remains to deal with questions of burden of proof. Two issues are important: (1) If it appears that a custom of segregation exists, and that a proprietor segregates in factual conformity to that custom, on whom should the burden rest with respect to the issue of his being to some extent influenced by the custom? (2) If it appears that a custom of segregation exists, and it further appears that the state in question has in force or until recent times has had in force a system of legal dispensations sanctioning segregation, on whom should the burden rest with respect to the issue of substantial causal connection between the custom and that legal regime?

9 Wigmore, *Evidence* (3d ed., 1940) §2486, states the general rule on the allocation of the burden of proof: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." And, again, ". . . [T]his apportionment depends ultimately on broad considerations of policy . . ." *id.*, §2488.

It is not doubtful where these considerations lead, with respect to the two numbered questions just put.

As to the first: It can surely be recognized by this Court, as a broad fact of human nature, that men are rarely wholly isolated from the settled customs of their communities, and that the notion of a man's acting in exact conformity to

custom, but without being influenced in any substantial way by the existence of the custom, is virtually a paradox. If this be doubted in the general case, surely it cannot be doubted in the case of the proprietor catering to the public; his business success (as one of the proprietors here testified, R. Bell 32) may depend on his conformity to community custom. And of course the business motive of pleasing his customers by conformity is not a *different* motive from conformity to custom, but that very motive itself, in one of its varieties of incidence. Given these facts, which it is hard to think anyone will care seriously to dispute, it is plain that the burden of proof; and a very heavy one, ought to be placed on the asserter of the proposition that some individual is that *rara avis*, a man who is in business catering to the public, and who factually conforms to public custom, but who does so *solely* from self-generated causes, and without any reference to the custom's existence.

As the second numbered question, the case seems equally plain, particularly in the light of the broad history of segregation. There is good historic ground for the belief that the segregation system was brought into being, or at least licked into shape, by state law. See Woodward, *The Strange Career of Jim Crow* (1957), 16-22, 81-85, 91-93, *et passim*.[10] Against that historic background, the issue is

[10] Professor Woodward emphasizes the relative recency of extensive segregation in America. Woodward, *The Strange Career of Jim Crow*, vii-viii (1957). Even after the end of Reconstruction the rigid system characteristic of later years had not become the rule. During the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South (id. at 18-24). This was true of Columbia, S. C.; T. McCants Stewart, a Negro, traveled throughout the South in April 1885 prior to the enactment of state laws requiring segregation of races and wrote the following remarks about Columbia:

> I feel about as safe here as in Providence, R. I. I can ride in first class cars on the railroads and in the streets. I can go into saloons and get refreshments even as in New York.

whether one should have to prove that custom was to some extent the function of law aimed at structuring the custom, or whether the opponent should have to prove that it was not. It is clear that the *total* lack of such a causal relation is the thing for which proof should be required. And it should be especially noted that, in cases such as the present, the asserter of the proposition that no causal relation exists between law and custom, that they have moved in a Cartesian parallelism, is the very state that maintained the legal provisions, now perceived to be unconstitutional, that were aimed at shoring up the custom; surely something not far from estoppel should at the least prevent the state's benefiting from the assumption that its own efforts were vain, without even adducing proof. Cf. *Peterson* v. *Greenville*, 373 U. S. 244, 248: "The State *will not be heard* to make this contention in support of the convictions." (Em-

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I can stop in and drink a glass of soda and be more politely waited upon than in some parts of New England (id. at 21).

Cf. also comments of Colonel Thomas Wentworth Higginson (id. at 16-17).

The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule (id. at Ch. II). Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that 'the Jim Crow statutes were effective means of tightening and freezing—in many cases instigating—segregation and discrimination.' The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing (id. at 90-91).

As late as 1895 and 1898 opposition to state attempts to introduce racial legislation in South Carolina prevailed. See the comments of the editor of the Charleston News and Courier (id. at 49-50), as well as those of Tom Watson (id. at 73).

phasis supplied.) Cf. Mr. Justice Harlan's concurrence in the same case, 373 U. S. at 252.

If these substantive and evidentiary principles are right, their application to the instant cases is plain. This Court will hardly require citation to the propositions that South Carolina has a public custom of segregation of the races, and has fostered and maintained that custom by law.[11] For South Carolina now to deny that segregation is at least in substantial part her doing is to assert that the deepest policies and most comprehensive laws of the state have been mere works of supererogation. The state ought at least be required to prove such a strange assertion, and the record is barren of such proof. What proof there is tends in the other direction; asked about his store's segregated policy, the manager in *Bouie* at one point did not immediately answer directly, but instead gave a reply which he obviously believed responsive because explanatory, "I would say that all stores do the same thing" (R. 26). In *Barr*, the co-owner and actual manager (R. 16)

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[11] State law requires segregation at circuses and traveling shows (Code of Laws of South Carolina Ann. §5-19 (1962)); in prisons and chain gangs (S. C. Code §55-1 (1962)); on steam ferries (S. C. Code §§58-714, 58-715, 58-718-720 (1962)); in carrier station restaurants or eating places (S. C. Code §58-551 (1962)); on streetcars, where Negroes are to be seated in the rear (S. C. Code §58-1331 (1962) and, when standing are to be kept as far from whites as practicable (S. C. Code §58-1332 (1962)); on buses (S. C. Code §58-1491 (1962)—held unconstitutional in *Flemming v. South Carolina Electric and Gas Co.*, 224 F.2d 752 (4th Cir. 1955) appeal dismissed 351 U. S. 901); in State parks (S. C. Code §51-2.1 to 2.4 (1962)—held invalid in *Brown* v. *South Carolina Forestry Commission*, (E. D. S. C., C. A. July 10, 1963). South Carolina announced that it would close its parks rather than desegregate, N. Y. Times, August 21, 1963, p. 24, col. 2.); in textile factories (S. C. Code §40-452 (1962)); and in schools (S. C. Code §21-751 (1962); Constitution of South Carolina, Article 11 §7—both held invalid in *Briggs* v. *Elliott, (Brown* v. *Board of Education)*, 347 U. S. 483).

testified that his "personal reasons" were not involved in the case (R. 20), leaving nothing but custom as a determinant of his actions. On the whole, there is nothing whatever in the South Carolina cases to rebut the natural inference, from the roughest knowledge of the recent and remote history of that state, that segregation in public places, such as those involved in the petitioners' convictions, takes place in South Carolina substantially because a state-wide public custom, massively supported by state laws abandoned only under pressure,[12] commands that it shall take place.

The Maryland case is concededly less crushingly obvious, but petitioners submit that it too falls within the principles contended for. The record in that case is absolutely clear in establishing that the segregation in question took place solely in obedience to custom, and much against the personal wishes of the proprietor (R. 32). The 1957 Annual Report of the Commission on Inter-racial Problems and Relations to the Governor and General Assembly states that 91% of all public facilities in Baltimore exclude or segregate Negroes (p. 13). In 1962, the same Commission's Report was to the effect that change had been "slow and inconsistent." In 1937, the Court of Appeals of Maryland held that "separation of the races is normal treatment in this state", *Williams* v. *Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937). Maryland, a slave-holding state, had until fairly recent times many Jim Crow provisions comparable to those of other southern states.[13]

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[12] The required pressure is sometimes of nearly geologic duration and intensity; on April 5, 1962, the City of Greenville arrested and charged a Negro with the crime of living in a "white block". (*City of Greenville* v. *Robinson*, Arrest and Trial Warrant No. 179); Cf. *Buchanan* v *Warley*, 245 U. S. 60 (1917).

[13] Maryland statutes concerning segregation in the state school system have not yet been repealed. There must be separate state

It should be made clear that no one is charging the present regime in Maryland with wrongdoing, with respect to segregation by statute or ordinance. The submission is altogether different; it is simply that where a state has, until times so recent as to fall within the formative years of people now in their prime, maintained a Jim Crow regime by law, and where the Jim Crow custom has hung on for the historically brief period since the legal regime began to wither, the probability of there being some causal nexus between the laws and the custom is so overwhelming that it is utterly unreasonable to allow the state, without proof, to enjoy, in a criminal case, the benefit of the implausible assumption that no such causal nexus exists.

Finally, it should be said that even if (as petitioners contend is not the case) either the state-created custom or the use of state police, prosecutor, attorney-general and courts (Point I-B, *supra*) be in itself an insufficient element of state action, nevertheless, in co-action, they are indisputably sufficient. These records, in a social context that is a matter of common knowledge, present the picture

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colleges (Ann. Code of Maryland, Article 65A, §1 (1957)); industrial schools (Md. Code, Article 77, §226 (1957)); normal schools (Md. Code, Article 77, §279 (1957)); juvenile reform schools (Md. Code, Article 27, §655, Article 78A, §14 (1957))—held unconstitutional in *Myers* v. *State Board of Public Welfare*, 224 Md. 246, 167 A. 2d 765 (1961); and separate scholarship grants (Md. Code, Article 49B, §5 (1957)). Miscegenation is still a criminal offense (Md. Code, Article 27, §398 (1957)). As late as 1951, a Maryland statute required segregation on railroads and steamboats. (Md. Code, 1939, Article 27, §510-526, repealed by Laws of Maryland, 1951, C. 22). Maryland was a party to the Southern Regional Education Compact, a measure designed to foster segregated education within the "separate but equal" framework. See Md. Code, Art. 41, §§185-188; see *McCready* v. *Byrd*, 195 Md. 131, 73 A. 2d 8 (1950). Hospital segregation was sanctioned by a 1939 provision, Md. Code, 1939, Art. 59, §§61-63.

of a segregation performed in obedience to a custom which is at least in substantial part a creature of state law; the action so motivated is then supported and enforced by prosecutions conducted by state officials, and by convictions in state courts. If "state action" is not to be found in such cases, then the "state action" concept has suffered some weird transformation from the coordinates of reality, and can be of no use in the process of adjusting constitutional interests. One need not doubt what the judgment of history will be on the proposition that the political power of the former segregating states is to no significant degree engaged in the present struggle.

In Part I.—E., *infra*, petitioners will suggest to the Court that sound principles in the interpretation of the substantive guarantees of the Fourteenth Amendment, and not untenable refinements in the concept of "state action", are the apt means to keeping inviolate the genuinely private life of man.

D. *The state has here denied equal protection of the laws, by maintaining a regime of laws which fails to furnish such protection to petitioners, and which instead subordinates their claim of equality in public life to a narrow and technical property claim.*

It is true that the Fourteenth Amendment applies only to those actions in which state power is to some significant degree engaged. But one of the things the state may not do is "deny . . . equal protection of the laws." An obligation not to "deny" protection is an obligation to furnish protection, to maintain a regime of law under which equal protection is enjoyed.

It is petitioners' submission that this obligation is breached by the state, when, far from maintaining such a regime, the state instead maintains a regime of law which gives paramount place to a narrow property claim here as-

serted with respect to premises in all senses but one open to the general public, and visits with criminal penalties the petitioners' attempts to protest and peacefully to resist the inconvenience and humiliation they suffer from their exclusion from the normal incidents of membership in the community.

With full knowledge (see Part I.—A., *supra*) that a racial discrimination was being sanctioned, the highest courts of Maryland and South Carolina, construing and applying statutes passed by their respective legislatures, have made an affirmative election between the values asserted in these cases, and have determined that, as a matter of state law, the value represented by the claim to exclude Negroes is to be preferred to that underlying the Negroes' claim to equal treatment in public facilities.

It is argued for the states that this is a neutral decision, that the courts have merely declared the common law, and neutrally furnished a legal framework to enforce the property rights to discriminate racially. It is argued that "at common law" restaurateurs could racially discriminate, and that, since no statute has changed this, they still can —the courts merely announcing these principles of law as they find them.

But modern American jurisprudence teaches that the states are as much the authority for, and as much responsible for, their common law rules as they are for their legislation; there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Erie R. Co.* v. *Tompkins*, 304 U. S. 69, 79, settled all that, and finally vindicated Mr. Justice Holmes' earlier dissents, where he had said:

"The common law so far as it is enforced in a state, whether called common law or not, is not the common

law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else." *Black & White T. & T. Co.* v. *Brown & Yellow T. & T. Co.*, 276 U. S. 518, 533-34 (Holmes, *J.*, dissenting).

"The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (Holmes, *J.*, dissenting).

And, of course, a state's formal adoption of the common law of England, as with Maryland's Constitution (Declaration of Rights, Article 5), confirms the formal equivalence of common law with statutory or state constitutional rules.

When a state acts by its legislature or its courts to promulgate rules of law affecting the competing claim of its citizens it must work its will within the limitations of state power imposed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 22, and *Marsh* v. *Alabama*, 326 U. S. 501, 505-56, both rest on this premise. It is conventional doctrine that rules of law declared by a state's judiciary to be the common law are just as much subject to the restraints of the Fourteenth Amendment as are legal rules embodied in legislation. This Court has frequently found denial of Fourteenth Amendment rights in judicially erected substantive rules. See *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252; *Edwards* v. *South Carolina*, 372 U. S. 229.

It is clear that the states have acted in resolving the conflicting claims being asserted here; it was inevitable that

they prefer one claim or the other or else leave the parties in conflict. If the state law, common or statutory, declared and effected a preference subordinating petitioners' rights to, say, the general associational preferences of the white community, and made it unlawful for a Negro to enter a "white" restaurant at all events without regard to the proprietor's wishes, such a choice (which is the very one embodied in some state statutes and city ordinances) would be obnoxious to the Fourteenth Amendment. See *Peterson* v. *Greenville*, 373 U. S. 244. But the state's interest in the psychological comfort of some of its citizens, and the state's interest in the enforcement of the property rights of some of its citizens are not of different *genera*. At the very least in the case of a criminal prosecution (though the limitation is unnecessary), the state chooses to infringe the one interest in furtherance of the other. The indictment in *Bell*, in its preservation of the old "peace and dignity" form, bears on its face the acknowledgment of state choice and state interest which alone justifies the imposition of any public sanction (R. 3). But no archaic form is needed to warrant the conclusion that where a state acts to protect one claimant as against another, it has itself determined the values of their respective claims, in the framework of its own public order.

The determination of the ranking to be given the interests asserted by the members of society, and hence of the legal sanctions to be applied in adjusting these interests, is in the general case the business of the states. But the Fourteenth Amendment overrides such of the state's choices as violate its terms. Where the choice ranks some asserted public interest above the interest in public racial equality, "equal protection of the laws", in the sense settled once for all in *The Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36, 70-73, and in *Strauder* v. *West Virginia*, 100 U. S. 303, 306, is not afforded, which is to say it is "denied".

All the purely public considerations which states could bring forward to justify their sanctioning of a racist regime have now been seen to be insufficient to support such state action, as against the Fourteenth Amendment. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483. It would be strange indeed if the state's interest in maintaining a narrow "property" right, which consists in nothing but the exclusion of Negroes, were to be found sufficient to justify a state in the knowing support of public racial discrimination. "Property" is in the regime of law, and is for all practical purposes the creature of law. As petitioners will copiously illustrate in Appendix A, the subjection of property to regulation, in the name of competing claims, is a massive part of our legal system. The state acts in one of its most characteristic ways, stretching from the law of nuisance to the law of fire-exits, when it determines where the limits on "property" rights shall be set, or, conversely, what sanction shall be put behind asserted "property" rights, and on what showing.

The regulation of the access of citizens to places of public accommodation is also a regular and normal part of the business of civilized regimes of law. Thirty states forbid racial discrimination in places of public accommodation and this type of regulation invades no constitutionally protected property rights.[14] *Railway Mail Ass'n*

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[14] Cal. Civil Code, §§51-52 (Supp. 1961); Colo. Rev. Stat. Ann. 25-1-1 et seq. (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 et seq. (Supp. 1960); Idaho Acts 1961, c. 309; Illinois, Smith-Hurd Ann. Stat., Criminal Code of 1961, Article 13; Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat Ann. §21-2424 (1949); Maine Rev. Stat., c. 137, §50 (Supp. 1959); Maryland Ann. Code, Art. 49B, §§11-15 (Acts 1963, c. 227, c. 228). (applicable only to certain counties); Mass. Gen. L., c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101,

v. *Corsi*, 326 U. S. 88; *Western Turf Asso.* v. *Greenberg*, 204 U. S. 359.

Moreover, virtually nowhere in the British Commonwealth or in the Western European democracies would the State find petitioners guilty of a crime if they committed within those jurisdictions the acts for which they have been brought to bar in Maryland and South Carolina.[15] (Notably, however, South Africa has the same rule as

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102 (1943); N. H. Rev. Stat. Ann. §354.1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948), Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961); Ohio Rev. Code §4112.02 (G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann. Tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); S. D. Acts 1963, Senate Bill No. 1, Jan. 30, 1963; Vt. Stat. Ann., Tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.2 (Supp. 1961).

[15] Insofar as can be ascertained, in the leading countries of the European continent, sit-ins of the type involved in the case at bar would not constitute criminal offenses. Since careful search of the jurisprudence has failed to disclose a single decided case or other authoritative source dealing with discrimination against Negroes or other racial groups in circumstances similar to those presented here, no authority squarely in point can be cited. However, principles of law well-established in those countries warrant the conclusion that a peaceable sit-in by a Negro would not constitute a crime. On the contrary, rather than punish the peaceable Negro sit-in, most, if not all, of these nations, including such prominent countries as France and Italy, grant him a right, protected by either civil or criminal sanctions or both, to be served and otherwise to make use of the facilities of the public accommodations to which he has gained entry.

In the Commonwealth nations there are also no reported cases of what here are called "sit-ins" in public restaurants. In these nations there are criminal trespass and related statutes which, for various reasons, as will appear, would be inapplicable to a "sit-in" situation. Moreover, in four Commonwealth nations and parts of another, discrimination is forbidden by law.

For a country-by-country analysis, see Appendix B.

respondents.) This near universal experience in nations that share our values is particularly pertinent in application of the Fourteenth Amendment which deals with those "personal immunities 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . or are 'implicit in the concept of ordered liberty.'" *Rochin* v. *California*, 342 U. S. 165, 169. This subject is, unlike the identity of one's dinner guests, a subject with which law may be expected to deal, a ubiquitous component of the modern legal regime. And the direction in which the laws of the great majority of other states and countries have dealt with the subject shows conclusively that, in claiming immunity from being penalized for entering public places, petitioners are not claiming icing on the cake, but the common daily bread of law's protection, as enjoyed virtually everywhere but in the American South and in the Union of South Africa.[16]

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[16] The integration of the subject of treatment in public accommodations into the whole regime of law, as well as the ineluctability of the state's making policy choices in this area, is well illustrated by the recent history, in Maryland, both of this subject and of the very statute under which the petitioners in *Bell* were convicted. One June 8, 1962, the Mayor and City Council of Baltimore passed an ordinance providing for equal treatment in places of public accommodation, with some exceptions. Proprietors of certain affected establishments filed suit to invalidate this ordinance on the ground, amongst others, that it infringed the very Article 27, §577 (the "trespass" law) under which petitioners were convicted. A lower state court upheld this contention (*Karson's Inn, Inc.* v. *Mayor and City Council of Baltimore* (Baltimore Superior Court Case No. 1962/990/74578)); the City's appeal is still pending (Md. Ct. of Appeals, 1963 Docket No. 29). Meanwhile, the Maryland legislature has amended Section 577 so as to prevent its application in this manner, but only as to the City of Baltimore, the following proviso having been added at the end of §577:

> Provided, however, that nothing contained herein shall preclude the Mayor and City Council of Baltimore from enacting legislation making it unlawful or prohibitory to refuse, withhold from or deny to any person because of his race, creed,

When one looks at the matter from the side of petitioners, it is evident that the state's duty of minimal protection has been grossly breached. The refusal of service in places of public accommodation is physically a nagging inconvenience and morally a humiliation; no *de minimis* considerations shield the state from the imputation here of failure to maintain a regime of law that does not flagrantly "deny . . . equal protection" to petitioners.

The force of this argument is greatly augmented by recurrence to the basic symmetries of social obligation. The states of South Carolina and Maryland are not proposing that the petitioners be exempted from taxation, or from the duty to obey the general criminal law. Some of the petitioners are liable to military service, and may even have to risk their lives to keep safe the cities of Columbia and Baltimore. Emotion-fraught though they be, these facts are a part of the framework within which one must construe the Fourteenth Amendment obligation of South Carolina and Maryland to maintain legal regimes which do not "deny" to petitioners the equal "protection" of the laws. The scope of affirmative "protection" required ought not, as a matter of sound interpretation, be less than what is decent in face of the fact that the heaviest

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color or national origin any accommodations, advantages, facilities or privileges of any place or places whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge. (House Bill No. 391, Chap. 453, Acts of 1963.)

(Cf. Maryland's New Public Accommodations Law, Md. Acts 1963, c. 227, c. 228.)

A seemingly "neutral" trespass statute which cuts deep enough to impede the solution by a city of its own public accommodations problem can hardly be characterized as genuinely neutral. But the deeper lesson is that in the struggle between those who would extend to all citizens equal rights in public places and those who would deny them the state cannot be neutral, but does inevitably make an election of the values which it is to support.

duties of citizenship, as well as the privileges of that status, were placed upon petitioners by the Fourteenth Amendment. Far from decent, it is scandalous that states imposing the burdens of state citizenship on Negroes, and benefiting from the imposition on them of the duties of federal citizenship, not only should fail to protect them in their right to be treated equally in fully public places, but should instead place the weight of law behind their humiliation.

It is useful to recall that this Court has long recognized that certain crucial abdications of governmental power—sometimes explained as affirmative decisions by government not to act—can make government responsible in the Fourteenth Amendment sense. The several opinions in *Terry* v. *Adams*, 345 U. S. 461, interpreting the "state action" requirement of the Fifteenth Amendment reflect this.[17] So

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[17] Justice Black (with Justices Douglas and Burton), 345 U. S. at 469:

> "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."

Justice Frankfurter, 345 U. S. at 473:

> "The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State action.' This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored."

At 345 U. S. 475:

> "The State of Texas has entered into a comprehensive scheme of regulation of political primaries, ... If the Jaybird Association, although not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that

does the majority's opinion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.[18] In the *Burton* case Justice Stewart's concurring opinion and the two dissents also embrace something of this notion when they state that a state law which sanctioned racial discrimination by restaurateurs in plain words would violate the Amendment.[19] This view underlies *McCabe* v. *Atchison, Topeka & S. F. Ry. Co.*, 235 U. S. 151, where the Court invalidated a state law which merely sanctioned but did not require a carrier's discriminatory policy. See also, *Public Utilities Commission* v. *Pollak*, 343 U. S. 451.

The affirmative thrust of the Amendment and the notion that failures to protect are embraced by the Amendment is clearly seen in opinions which found violations of the Civil

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subversion, they cannot divest themselves of the State authority and help as participants in the scheme."

And at 345 U. S. 477:

"The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary."

Mr. Justice Clark (with Chief Justice Vinson and Justices Reed and Jackson), 345 U. S. at 484:

"Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth, 'refers to exertions of state power in all forms.' Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play."

[18] "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service but has elected to place its power, property and prestige behind the admitted discrimination." (365 U. S. at 725.)

[19] 365 U. S. at 726-727, 729.

Rights laws when policemen stood aside while mobs attacked their prisoners (*Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951), cert. den. 342 U. S. 831), or unpopular religious workers (*Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943)).

In *Mapp* v. *Ohio*, 367 U. S. 643, it was maintained by the State that its courts had not affirmatively sanctioned police incursion into constitutional guarantees of privacy and that, therefore, its courts were not to be held accountable for the violation of those guarantees. But this Court held the state court proceedings to be violative of the due process clause because the state court had ruled admissible evidence seized as the fruit of an unconstitutional search; the state court had failed adequately to protect the individual's privacy. In overruling *Wolf* v. *Colorado*, 338 U. S. 25, and thereby making the federal exclusionary rule applicable to the states, Mr. Justice Clark said:

> [W]e note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the states was that "other means of protection" have been afforded the right of privacy. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this court since *Wolf*. 367 U. S. at 651-652.

It is submitted that this reasoning is applicable to the instant cases. That is, when a state court, as here, fails to adequately protect the right to be free from racial discrimination, it is responsible for that discrimination, just as the state court which failed to adequately protect the right to privacy was responsible for its violation.

Nor is this all. In *Mapp*, it was pointed out by Justice Clark that the state court, in admitting such tainted evidence, was subverting judicial integrity. A court must not remain aloof to the methods which bring evidence to its doors. Neither, it is submitted, may it blind itself to the consequences of its decisions. There is a right to equality: "we can no longer permit that right to remain an empty promise." [20]

In *Griffin* v. *Illinois*, 351 U. S. 12, it was contended by the state that because an indigent criminal defendant could not afford a costly transcript necessary for appellate review was no reason to charge the state with discrimination against the poor. But this Court disagreed and held that the rule, although nondiscriminatory on its face, was grossly discriminatory against the poor in its operation. This reasoning is applicable; it is no answer to say that the trespass law applies equally to whites and blacks, just as it was no answer in *Griffin* to say that the rule there applied equally to rich and poor. Classically, it is no answer to say that "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (351 U. S. at 23). Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

The operation of this trespass law is to enforce and effectuate racial discrimination, and the fact that the law on its face does not command racial discrimination must not mislead.

The opinion in the *Civil Rights Cases*, 109 U. S. 3, lends support to the notion that states are responsible for some failures to provide a legal system which protects against discrimination. How else can the importance the court attached to the assumption that the state laws would furnish

[20] 367 U. S. at 660.

redress against denial of equal access to inns and common carriers be explained?[21] Similar overtones appear in *United States* v. *Cruikshank*, 92 U. S. 542, 554-555.[22] The legislative debates at and around the time of adoption of the Fourteenth Amendment assure us that these notions

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[21] "We have discussed the question presented by the law, on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right or not, is a different question, which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine. (109 U. S. at 19.)

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. (109 U. S. at 24.)

Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy, under that amendment and in accordance with it. (109 U. S. at 25.)"

[22] "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. *The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.* That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right." (Emphasis supplied.)

And cf. *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282; 1871).

of the affirmative thrust of the Amendment were not judicial inventions.[23]

Petitioners have here contended that the Fourteenth Amendment imposes an affirmative obligation on the State to ensure "equal protection of the laws". It is obvious that federal judicial enforcement of that affirmative obligation would raise difficult questions which need not be broached

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[23] For example, Rep. Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

> "1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.
>
> 2. That a failure to enact the proper laws for that purpose, or a failure to enforce them, is a denial of equal protection.
>
> 3. That when there is such a denial Congress may enact laws to secure equal protection."
>
> Cong. Globe, 42nd Cong., 1st Sess. 483 (1871).

Representative Lawrence in debates on the Civil Rights Act of 1875 stated: "What the State permits by its sanction, having the power to prohibit, it does in effect itself." Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).

Other contemporary Congressmen also suggested that state inaction may be culpable as action. In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

here. The Court may be obliged to leave the states "a wide area of . . . constitutional discretion" in fashioning means to fulfill the duty of equal protection. *Griffin* v. *Illinois*, 351 U. S. 12, 20, 24. The definition of the measure of a state's affirmative obligation might even be outside judicial competence, and the obligation might have to be left, at least in some circumstances, inchoate and moral only. (Cf. *Kentucky* v. *Dennison*, 65 U. S. (24 How.) 66, where an affirmative federal constitutional duty was found clearly to exist, but federal judicial enforcement was found unpractical.) It might be that the measure of state affirmative obligation would have to be made specific, and hence judicially manageable, by Congress, acting under §5 of the Fourteenth Amendment. Under that section, doubtless, Congress might either require the states to afford appropriate judicial remedies (see *Testa* v. *Katt*, 330 U. S. 386), or, under a broad reading of its power to "enforce", provide federal remedies to fill the gaps of state inaction.

None of these questions need give trouble here. If the state has an obligation, however shadowy of contour with respect to affirmative remedies, to maintain a legal regime in which Negroes are not "denied protection" in their claim to be treated as equal members of the community, then the state is *a fortiori* under an obligation not to put its criminal law machinery in motion in the opposite direction, and the reversal of the judgments here is clearly called for.

Petitioners recognize that in order to find state action on the basis urged in this portion of the brief it is necessary to discard a part of the holding in the *Civil Rights Cases*, 109 U. S. 3. The argument does not challenge the basic pronouncement of the *Civil Rights Cases* that the Fourteenth Amendment is addressed to state governments and not to individuals and that some state involvement is necessary. But it does challenge the holding that states are not con-

stitutionally responsible for—and that the Fourteenth Amendment does not reach or allow Congress to reach—racial discrimination in privately owned business premises.

It is recognized that the principal difficulty about the present argument is the problem of its limitation within manageable bounds. It is in the tradition of our legal system that the process of such limitation must proceed case by case. Nevertheless, petitioners submit that the very phrase, "equal protection of the laws", suggests a limitation to matters commonly dealt with by law, as, for example, the choice of guests in the home is not. Further, the whole thrust of the Fourteenth Amendment is toward the public life. The general problem of the placing of principled limitation on the impact of the Amendment, even under the theories of "state action" so far argued, will be taken up in the section immediately following.

E. ***The theories of "state action" urged by petitioners in the foregoing arguments need not result in the subjection of the private life of individuals to the norms of the Fourteenth Amendment.***

Petitioners have urged, in application to the facts of these cases, that "state action" is to be discerned in the following circumstances:

1. Where the formal organs of state power (as courts or the executive) are employed to enforce a scheme of racial discrimination originating in a nominally "private" choice (I-B).

2. Where a nominally "private" act or scheme of racial discrimination is performed, in significant part, because of the influence of custom, and where such custom has been, in turn, in significant part, created or maintained by formal state law (I-C).

3. Where the state maintains a regime of law which, in its net operation, places a higher value on some asserted contractual or property claim than it places on the claim to move about free from the inconvenience and humiliation of racial discrimination (I-D).

None of these theories is strained or paradoxical. The first, is the seasoned law of *Shelley* v. *Kraemer*, 334 U. S. 1, but if it were a new proposition it would amount to no more than the assertion that the state "acts" when its formal organs act, and that it then "acts" to that end which is the intended and natural result of their action—a proposition near to truism. The second applies to "state action" ordinary theories of causation, and merely attributes to the state the effects in society of its formal acts—an attribution again more susceptible to the imputation of truism than to that of paradox. The third, interpreting literally the state's obligation not to "deny . . . equal protection of the laws," simply finds such protection "denied" when the regime constituted by those laws grossly fails to protect equality.

It is submitted that the uneasiness which the first consideration of these theories may produce stems not from any difficulty about their intrinsic correctness, but rather, from a difficulty in discerning how their application can rationally be limited so as to prevent the absurd application of constitutional requirements to the genuinely private and personal choices of man.

It would violate the soundest methodologic canons of our case-law system for this Court now to face and answer every question that might someday arise as to the application of the theories urged to these private and personal choices.[24] Petitioners now submit, however, that

[24] Cf. Frankfurter, J., concurring in *Smith* v. *California*, 361 U. S. 147, 161-162.

several lines of evidently sensible distinction can be foreshadowed, for development and application as cases may arise, and that the application of one or more of the above theories to the present cases need not, therefore, be arrested by apprehension lest the Court might thereby irreversibly have started down a road leading to violation of the sacred areas of human privacy.

It will be submitted that these distinctions go not so much to the question of the presence or absence of "state action" as to the question whether the *substantive guarantees* of the Fourteenth Amendment are violated. See Henkin, "*Shelley* v. *Kraemer*: Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962). That Amendment does not forbid all "state action," but only such state action as violates those substantive guarantees. The latter, in turn, are (like all constitutional provisions) susceptible of reasonable interpretation, in the light of their purpose of ensuing a practical and thoroughgoing equality for the Negro, in the communal life of the states. The *Slaughter-house Cases*, 83 U. S. (16 Wall.) 36. The following distinctions (not supposed to be exhaustive) furnish copious means for the legitimate performance of that task of interpretation in such a manner as to prevent an interference with the genuinely private life.

First and most crucially, the records in these cases affirmatively establish that no private or personal associational interest is at stake. This is obvious on the face of it; the relation involved is that of a restaurant-keeper to a casual customer. Eckerd's Drug Store, in *Bouie*, is one of a large chain, and the manager who ordered petitioners out was acting in compliance with company policy; obviously, no personal relational interest can exist in such a case. Mr. Terry, the co-owner of the store in *Barr*, testified, "I don't think my personal reasons are involved

in this case, are they?" (R. 20). In *Bell*, the restaurant owner testified that he personally was in sympathy with petitioners' objectives, but had to keep them out to please his customers (R. 32). The only genuinely personal choice involved in such restaurant cases, so far as association is concerned, is the choice that parties of customers might make to eat together, a choice limited along racial lines, where segregation prevails.

Secondly, and closely connected, the events and the issues in these cases are in the fully public rather than in the private life. A restaurant is a public place, contrasting totally with the home and other traditional citadels of privacy. Segregation in restaurants is a sectional and national public problem; no informed person (and certainly not the members of this Court, given the content of its docket) can fail to be aware of this fact. The practice of restaurant and other public segregation defines the public character of whole communities and states, and significantly affects the status of millions of American citizens. The Fourteenth Amendment guarantees, it may be thought, are ancillary to the "citizenship" it confers (see *Slaughterhouse Cases, supra*) and "citizenship" is a public term, having to do with the public life.[25]

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[25] It may be that the citizenship clause of the Fourteenth Amendment is to be read as an affirmative grant of membership in our society, carrying with it not merely the right to be referred to as a "citizen," but also the right to be treated as an equal member of the community. See Mr. Justice Harlan's dissent in *The Civil Rights Cases*, 109 U. S. 3, 46-47 (1883). As Justice Harlan there points out, this inclusion immediately resulted in the application to the new citizens of the "privileges and immunities" clause in Article IV, §2. Cf. *Scott* v. *Sanford*, 60 U. S. 19 (19 How.) 393, 404, 407 where "citizenship" is treated as being defined by one's being "a part of the people," fit to "associate with the white race." It is to be observed that there is no textual basis for a "state action" requirement with respect either to the citizenship clause of the Fourteenth Amendment or to the privileges and immunities clause

Thirdly, no competing federal constitutional claims must be weighed here against the petitioners' claim to be extended protection against racial discrimination or at the least not to have the state use its power *de facto* to further and support such discrimination. If the privacy of the home, as recognized in the Third Amendment were at stake,[26] or if the aim were to enforce association forbidden by religious tenets, or if what were proposed were an invasion of privacy as deep as that effected by unauthorized search, or if any other constitutional norm of independent value (as freedoms of speech, assembly, petition, etc.) were brought into confrontation with the one petitioners assert, accommodation would evidently have to be made, for the Constitution is to be construed as a whole.[27] Here the only colorable competing claim would arise from the Fifth and Fourteenth Amendment guarantees against the deprivation of property without due process of law,

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of Article IV, §2. This absence of textual basis is highly material, for the doctrine of the *Civil Rights Cases*, the fountainhead of the "state action" concept, was based on the phrase "No State shall . . ." Cf. Mr. Justice Harlan's characterization of *The Civil Rights Cases* opinion as resting on "subtle and ingenious verbal criticism" (109 U. S. at 26).

[26] Douglas, *J.*, concurring in *Lombard* v. *Louisiana*, 373 U. S. 267, 274:

> "If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the state against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy."

[27] "The Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be severed from the rest of the Constitution." Frankfurter, *J.*, concurring in *Reid* v. *Covert*, 354 U. S. 1, 44. Cf. Henkin, *op. cit. supra*, 110 U. Pa. L. Rev. at 487.

but those guarantees protect only against arbitrary regulation unrelated to legitimate public ends (*Nebbia* v. *New York*, 291 U. S. 502), and such a claim could not be weighed in the same scale as the petitioners' claim to be free of public racial discrimination, a thing categorically and at all events forbidden.

Fourthly, the businesses and places concerned in the cases at bar are already abundantly regulated; their licensing and their subjection to minute codes is a common-place of modern life.[28] They are not only *de facto* public, but are built into the regulatory regime of our law. Most strikingly, the very relationship here concerned—that of restaurant-keeper and customer—has traditionally been regulated *in both directions* by the law's command that dis-

[28] Maryland chain stores (Ann. Code of Maryland, Article 56, §§2, 57 (1957)), restaurants (Md. Code, Article 56, §178 (1957)) and soda fountains (Md. Code, Article 56, §174 (1957)) are licensed by the state. A person doing business is subjected to fine or imprisonment (Md. Code, Article 56, §9 (1957)). Maryland law prescribes comprehensive sanitary rules and regulations for places where food is to be served. (Md. Code, Article 43, §200 (1957)). The State Board of Health is given *a right of entry* for purposes of inspection. (Md. Code, Article 43, §203 (1957)). The Board is also empowered to make further rules and regulations necessary to effectuate the statute (Md. Code, Article 43, §209 (1957)). Violations of these provisions are punishable by fine or imprisonment or both. (Md. Code, Article 43, §202 (1957)).

South Carolina restaurants, cafes and lunch counters are governed by rules and regulations formulated by towns and cities. Code of Laws of South Carolina Ann. §§35-51, 35-52 (1962). Failure to comply with municipal regulations may result in denial or revocation of a license (S. C. Code, §35-53 (1962)) or punishment by fine or imprisonment (S. C. Code, §35-54 (1962)). State law exists concerning refrigerators in restaurants (S. C. Code, §35-130 (1962)), dishes and utensils (S. C. Code, §35-131 (1962)), food (S. C. Code, §35-132 (1962)), garbage disposal (S. C. Code, §35-133 (1962)), physical examination of employees (S. C. Code, §35-135 (1962)), inspection by the State Board of Health (S. C. Code, §35-136 (1962)). Violation of state laws is subject to fine or imprisonment (S. C. Code, §35-142 (1962)). Licenses are required in order to operate luncheonettes. The proprietor in *Barr* mentioned his city licenses (R. Barr 18).

crimination be practiced[29] (a command now perceived to violate the Fourteenth Amendment),[30] and by the command that it not be practiced.[31] The application of the Fourteenth Amendment to the formation of this relationship is not a radically new entrance of government into a matter hitherto assumed to be free, as would be the case if the Fourteenth Amendment were applied to the living room, to the really private club, or to the car-pool.

Fifthly, *de facto* segregation, by nominally private choice, is the functional equivalent, or a close approximation thereto, of something forbidden by the Fourteenth Amendment, for it makes no practical difference to a Negro whether he is barred from public places by city ordinance, or barred from the same places by a nominally "private" segregation resting on tacit understanding and custom—just as it made no difference to him in *Shelley* v. *Kraemer*, 334 U. S. 1, whether ordinance or covenant kept him out of a neighborhood, and made no difference to him in *Terry* v. *Adams*, 345 U. S. 461, whether his right to vote effectively was taken away by statute or by the Jaybirds, and made no difference, in *Marsh* v. *Alabama*, 326 U. S. 501, whether speech was effectively denied by enforcement of trespass statutes on company-owned streets, or by more candid means.[32]

Sixthly, the "property" interest asserted here is minimal and technical. It amounts to no more than the right to exclude Negroes from a place where everybody else is

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[29] South Carolina law requires segregation in carrier station restaurants or eating places. S. C. Code, §58-551 (1962).

[30] *Peterson* v. *Greenville*, 373 U. S. 244 (1963).

[31] See footnote 14, *supra*.

[32] And compare, *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied, 333 U. S. 875, with *Brown* v. *Baskin*, 80 F. Supp. 1017 (E. D. S. C. 1948), aff'd 174 F.2d 391 (4th Cir. 1949).

welcome. Its assertion is, correspondingly, not so much a reason as a restatement of the claim. Sanctity or "sacredness," [33] has been predicated of this claim, but not many angels can dance on the point of this needle. If "sacredness" is a relevant concept here, its emotional overtones may more readily be enlisted on the side of the petitioners, who, as Americans, subject to the most exacting duties of citizenship, assert their right to move about in public as equal members of the citizenry.

Seventhly, though, not by literally verbal means, the petitioners here were expressing themselves on topics of high public concern, as Ghandi was doing when he marched to the sea. *Thornhill* v. *Alabama*, 310 U. S. 88; *Stromberg* v. *California*, 283 U. S. 359. This fact gives emphasis to the location of these events in the fully public life (cf. *Marsh* v. *Alabama*, 326 U. S. 501), and suggests a special concern to make sure that the power of the State is not engaged in the suppression.

It is necessary to be precise as to the bearing of these numbered points on the present question. Petitioners are not asserting that "state action" is itself to be found in any of these considerations. "State action," they rather assert, is to be found in these cases through one or more of the theories developed in parts I-B to I-D, *supra*, and summarily listed at the beginning of the present section. Petitioners recognize, however that "state action," under any of these three theories rationally developed, might be found in cases where the result of the application of the Fourteenth Amendment would be an absurd incursion into areas of genuine human privacy. For the clearest example, "state action" might be found, under the *Shelley* theory of Point I-B, where legal process is used to keep an unwanted in-

[33] *North Carolina* v. *Avent*, 253 N. C. 580, 588, 118 S. E. 2d 47, 53 (1961).

truder out of the home. The numbered points briefly sketched just above are designed to suggest to the Court that, whether or not, as an abstract question, "state action" is present in such a case, there are many lines along which, by following an interpretation of the substantive guarantees of the Fourteenth Amendment consonant with the social context in which it exists, the Court might, if the necessity should ever arise, keep the Fourteenth Amendment out of the living-room, where it does not belong, without keeping it out of the public life of the community. The full development and application of any one of these distinctions is obviously not called for in this case; the fact that they are evidently sensible is relevant to these cases only as a means of demonstrating that, by recognizing the existence of "state action" in these cases, the Court is not committing itself to the application of constitutional imperatives to the authentic privacies of the people.

The extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity. But the problem created by this unacceptability cannot be solved in a principled manner by pretending not to see "state action" where it is present. This pretense carries a double danger. To protect the privacy of the living-room by blinding oneself to the very palpable "state action" that actively or potentially maintains that privacy is to endanger the privacy itself, for the gross fiction stands permanently vulnerable. On the other hand, the felt necessity of ignoring the "state action" that protects the living-room must result in sporadic and irrational failure to recognize 'state action' where it exists and where no genuine interest in privacy is present, for the concepts elaborated to shore up the illusion that "state action" does not support and enforce the choices of men in their purely private life are bound to radiate, with

arbitrary effect, into fields where no such choices are really concerned. (The present cases, in fact, present the latter danger.)

It is earnestly urged that the way out of this impasse does not lie along the road of the elaboration of qualitative distinctions among different "forms" of state action. These distinctions have no warrant in the language of the Fourteenth Amendment. They have no relation to the purposes of that Amendment. They cannot be made to correspond to any wise views of the relations between the private man and his society, and the endless series of fine lines which they proliferate must ceaselessly be drawn and redrawn, as time produces endlessly new patterns of state intervention and involvement. The way out does not lie in a distinction between "more" or "less" state action, for there is not the roughest scale of quantitation, objective or intuitive, along which the incommensurables of the multiform presented facts can be measured.

The "state action" concept, burdened as it is and must be with an unshakeable train of teasing questions in the metaphysics of law, is not an apt instrument for drawing practical lines. In the ultimate jurisprudential sense, "state action" supports every private action; to "draw the line" between "private" and "state" action is like trying to determine which jaw of the vise is gripping the piece of wood. In a more pragmatic and experiential sense, "state action" is always seen, in at least one and usually in many gross forms, in every case of racial discrimination reaching this Court or likely to reach it.

The way out lies in a frank acceptance of at least this pragmatic omnipresence of "state action," and in the equally frank use of an available alternative technical resource for doing the work which the "state action" concept cannot rationally do. That work is the protection of the really

private life of man—in its arbitrary choices, in its caprice, even in its injustice—from subjection to the standards of the Constitution. The available technical device, as suggested above, is the exploration of a rule of interpretation of the substantive guarantees of the Fourteenth Amendment, which would limit them to incidence upon public life. The Fourteenth Amendment lives in a socal context—and in a constitutional context—wherein privacy and individuality are of high assumed value, and there is nothing unwonted to law in the application of that context to its interpretation.

It is not supposed that the distinction between the public and the private life is one of hair-line clarity. If, as Mr. Justice Holmes said, all law, as it becomes more civilized becomes a matter of degree,[34] then all law, in the process of its civilization, moves from the fictitious and facile clarity of categorical concept into the less impressive but at least workable phase of assessment and weighing. The distinction between the public and the private life of man, as a criterion for the application of the Fourteenth Amendment, has at least the merit, so hard to attain, that it tries to draw the line in the place where the line is wanted, along the cleavage of felt need and apprehension. And its substitution as a conceptual means for doing some of the work now assigned to the "state action" concept is not the substituting of the vague for the clear, but rather the substitution of a vagueness progressively clarifiable for an apparatus of nebulous confusion and multiple ambiguity.

To summarize and perhaps clarify this point, it is not here contended that "state action" is not a requisite for the application of the Fourteenth Amendment. If that case ever comes to the bar of this Court of which it can truly be

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[34] Holmes, J., partially concurring in *LeRoy Fibre Co.* v. *Chicago, M. and St. P. Ry.*, 232 U. S. 340, 354.

said that "no state action" in any form supports the discriminatory pattern, then "state action" rule surely ought to be applied. It is rather contended that the "state action" concept, admitting its validity, must either be artificially and arbitrarily burdened with distinctions corresponding to no reality, or else can do no work. It is urged that the work for which this concept is wanted can be done by wholly different concepts, legitimately to be applied to the interpretation of the Fourteenth Amendment. Without deciding hypothetical cases not now before the Court, it is easy to perceive that these considerations make it possible to give effect to the presence of "state action" in these cases, without any unwanted commitment to the application of Fourteenth Amendment guarantees to the genuinely private concerns of man.

II.

The Convictions of Petitioners in the *Barr* and *Bouie* Cases, Pursuant to S. C. Code, §16-386, and in the *Bell* Case Under Md. Code Ann., Art. 27, §577 Deny Due Process of Law Because There Was No Evidence in the Records of the Conduct Prohibited by Those Laws, or Else, the Laws as Construed to Include Petitioners' Conduct Do Not Convey a Fair Warning That It Was Prohibited.

The records in *Bouie* and *Barr*, the cases from South Carolina, show (if the testimony be taken most favorably to the State) an invited entry into a drug store open to the public, an entry into the lunch counter section not forbidden by any notice, and a short delay in getting up and leaving when requested to do so. Of course, arrest and jail sentence on such a factual showing, would be quite incredible if one did not happen to know that Negroes were involved. But it is not too much to speak of sheer fantasy

when one reads the text (understandably not quoted in the South Carolina court's opinion) of the statute (S. C. Code §16-386) into which these facts are supposed to fit:

> Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

Quite aside from the very evident fact that the statute is aimed at trespass on open lands, the decisive objection to its application to petitioners is that it prohibits *"entry . . . after notice,"* and that is not what was proved here. Much expansion cannot add to this simple truth.

In these and a contemporaneous sit-in case, *Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 572 (1961), the South Carolina court, evidently confusing the law of civil trespass with the problem of this statute's meaning, has introduced an entirely novel construction of this statute, holding, in effect, that "entry" means "remaining a short while," or, in the alternative, that "after" means "before."

These convictions either offend the due process clause under the doctrine of *Thompson* v. *Louisville*, 362 U. S. 199, and *Garner* v. *Louisiana*, 368 U. S. 157, or else the law has been so unfairly expanded by construction that it fails to warn, violating the principles of *Lanzetta* v. *New Jersey*,

306 U. S. 451; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Edwards* v. *South Carolina*, 372 U. S. 229; and other similar cases.

South Carolina, subsequent to petitioners' arrest, passed a law specifically relating to failure or refusal to leave business or other premises "immediately upon being ordered or requested to do so." [35] The South Carolina courts have long recognized a difference between entry after notice and "trespass", saying that "trespass" is not identical but is "more comprehensive." [36]

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[35] S. C. Code, (1962) §16-388, (S. C. Acts 1960, p. 1729, Act No. 743, May 16, 1960) provides:

"Entering premises after warning or refusing to leave on request; jurisdiction and enforcement.—Any person who, without legal cause or good excuse, enters into the dwelling house, place of business or on the premises of another person after having been warned within six months preceding not to do so or any person who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

"All municipal courts of this State as well as those of magistrates may try and determine criminal cases involving violations of this section occurring within the respective limits of such municipalities and magisterial districts. All peace officers of the State and its subdivisions shall enforce the provisions hereof within their respective jurisdictions.

"The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another."

This was the provision involved in *Peterson* v. *Greenville*, 373 U. S. 244.

[36] See *State* v. *Hallback*, 40 S. C. 298, 18 S. E. 919, 922:

". . . but it is clear that 'trespass' is a more comprehensive term than 'entry,' and indeed includes it, especially when we consider the words that follow—'after notice'—which does not

A conviction without evidence to support it may also be perceived as one based on a law which fails to give fair warning. Indeed, *Thompson* v. *Louisville*, 362 U. S. 199, 206, rested in part upon *Lanzetta* v. *New Jersey*, 306 U. S. 451. Surely the South Carolina entry after notice law (§16-386) utterly fails to convey to potential offenders or to the tribunals any standards by which the proposed or past act could be charged. Could this statute furnish any warning to petitioners that what they were doing violated it, and could it be thought to command their conviction, on the factual showing in these records, with anything like the clarity needed in a court of law? The obvious negative answers make it clear that due process was violated.

The Maryland statute involved in *Bell* read, in part, as follows:

> "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, and on conviction thereof before some justice of the peace in the county or city where such trespass may have been committed be fined . . . . " (Md. Code, 1957, Art. 27, §577).

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occur at all in section 2501 [now §16-382], which creates the offense of 'trespass.'"

In *State* v. *Mayz*, 24 S. C. 190 (1886), the distinction was made between entry after notice and trespass, the court holding that an affidavit charging "trespass after notice" failed to inform the defendant that he was charged under G. S. 2507 (now §16-386) rather than under G. S. 2501 (now §16-382). Giving notice was referred to as "essential" (24 S. C. at 195).

None of the civil trespass discussion in cases relied on by the State such as *Shramek* v. *Walker*, 152 S. C. 88, 149 S. E. 331, and *State* v. *Lazarus*, 1 Mill., Const. (8 S. C. Law) 31 (1817), has any bearing on the meaning of entries after notice in §16-386.

The application of this statute to the peaceable refusal to leave a restaurant table does not excite the risibilities, as does the analogous application in the South Carolina cases. But the radical vice is the same. What is prohibited is entering or crossing of land, premises, or private property, after due notification, and that is not what petitioners did. The indictment, drawn after the statute, charged them with entering and crossing the premises "*after* having been duly notified by Albert Warfel . . . not to do so. . . ." (R. 3; emphasis supplied), but the record conclusively shows that this notification (by Warfel) was given when the petitioners were seated at tables in the restaurant (R. Bell 28-29, 39).[37]

Again, the Maryland court has, by a novel construction of this old law in a recent sit-in case decided after petitioners' acts (*Griffin* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961), cert. granted, 370 U. S. 935), interpreted this statute to apply to the act of remaining after warning. No prior Maryland law was invoked to support this novelty;[38] the court in *Griffin, supra,* looked to *State* v. *Avent,* 253 N. C. 580, 118 S. E. 2d 47 (1961), vacated 373 U. S. 375, North Carolina's response to the sit-ins. But to that construction the same remarks apply as were made above with respect to the South Carolina statute. If, as a matter of state law, a statute saying "enter" means "remain," then, as a

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[37] The single possible exception to this is that Mr. Warfel informed petitioner Quarles of "company policy" at the front of the dining room (R. Bell 27-28); there was no other description of Warfel's statement to Quarles, and no statement that he was forbidden to enter in explicit terms. Quarles said he became engaged in a conversation with Mr. Hooper, the owner, at this point (R. Bell 43).

The indictment (R. Bell 3, 14) was based upon Albert Warfel's order to leave and did not refer to Miss Dunlap, the hostess. In any event, her statement—"We haven't integrated as yet"—did not unequivocally forbid entry (R. Bell 24).

[38] In 1958 the Maryland court had emphasized the importance of notice forbidding entry, *Krauss* v. *State*, 216 Md. 369, 140 A. 2d 653 (1958).

matter of federal law, that statute fails, as so applied, in the basic due process requirement of reasonable clarity in its command to the citizen and to the tribunal that must decide whether it has been broken.

Although it is submitted that due process would, for the reasons given in this part, be wanting in these convictions if petitioners had been ordered to leave because they were not wearing ties, or for any other reason exciting no special federal constitutional sensitivity (Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451), that question need not be decided in these cases. It is settled that the requirements of clarity are especially high in cases involving, as these certainly do, the attempted penalization of expression.[39] *Smith* v. *California*, 361 U. S. 147, 151; *NAACP* v. *Button*, 371 U. S. 415, 432, and cases cited; cf. *United States* v. *National Dairy Prod. Corp.*, 372 U. S. 29, 36. The reason for this is that freedom of expression, a specific federal right of great importance in our polity, would be crippled if those exercising it had to guess whether a vague statute might be held to apply to them, or had to guess, as here, whether a statute which seemed obviously inapplicable would be stretched to apply. In short, a buffer zone must be provided, "because First Amendment freedoms need breathing space to survive." *NAACP* v. *Button*, 371 U. S. 415, 433. Then, too, free expression would be endangered if courts, expressing local interests, could freely avail themselves, for the purpose of suppression, of the device of strained construction of seemingly inapplicable statutes, or if police and prosecutors could engage in "selective enforcement against unpopular causes." *Button*, *supra* (371 U. S. at 435); *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *Smith* v. *California*, 361 U. S. 147, 151.

[39] It is settled that non-verbal expression such as petitioners' conduct is included within "First Amendment" concepts. *Stromberg* v. *California*, 283 U. S. 359.

For the same reasons a high standard of clarity is imposed on statutes employed to diminish racial equality, for that equality is a federal constitutional interest of very high rank. *Wright* v. *Georgia*, 373 U. S. 284. Even if, contrary to petitioners' view, a state may sometimes employ its judicial power and criminal laws to further and support private racist patterns, it is submitted that this ought to be allowed only where the state law speaks with clarity. The measure of that required clarity need not be taken here, for these statutes, insofar as they are clear, clearly do not apply to the actions of petitioners, and they can be made to apply only by a fiat of construction.

III.

The Convictions in *Barr* v. *Columbia* Should Be Reversed on Several Grounds Specially Applicable to That Case.

A. *In the case of Barr v. Columbia there were special circumstances of police involvement in the racially discriminatory scheme which would supply the element of state action and furnish grounds for reversal if no other existed.*

The following facts are taken from the uncontradicted testimony of the State's own witnesses, the arresting policeman and the manager of the drug store. The manager testified that the police first became involved in the matter of sit-ins in his store when " . . . they came and informed me of the demonstration and *we were working as a group* . . . . I didn't call them to come around and inform me. They informed me in advance" (R. Barr 21) (emphasis supplied). This "group" work with the police resulted in a " . . . previous agreement to that affect, that if they did not leave, they would be placed under arrest for trespassing" (R. Barr 23). In answer to the question, "So

in fact you had instructed the Police Department to arrest them if they refused to leave at your request?" the manager testified, "Not necessarily, I had instructed them, but that was an agreement pertaining to the law enforcement division" (R. Barr, 23). The arresting officer in turn, testified that he was at the drug store not on special call but by prearrangement (R. Barr 5-6). This testimony conclusively establishes that the actions of the police were taken by general and concerted prearrangement, and not by mere arrest on complaint or on the basis of casual observation.[40] Whether or not conclusive in itself on the "state action" question, this fact wholly determines the crucial significance of what follows.

Mr. Stokes, the arresting officer, was waiting in the store for the arrival of the expected sit-in demonstrators (R. Barr 6). After they came in, he testified, Mr. Terry, the manager, "made the statement to the five, that he wasn't going to serve them, that they would have to leave" (R. Barr 4). Then, in an action which establishes beyond doubt the close affirmative involvement of the police in the discriminatory scheme, the officer, in his own words, " . . . *requested* that Mr. Terry go to each individual and ask him to leave in my presence . . . . " (R. Barr 4) (emphasis supplied). The store manager's testimony exactly corroborates this point (R. Barr 17).

There is no ambiguity in this action. The officer was not merely keeping order, or arresting for a crime which he passively observed. He *was engaged in counseling the store owner on the means of producing clearcut evidence of*

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[40] The closeness of the City's supervision of and interest in this matter, and the nature of its policy commitment, is indicated by the statement attributed to Columbia's City Manager by petitioner Carter: "Gentlemen, further demonstrations will not be tolerated" (R. Barr 28).

"crime," and even "requesting" that he take this racially discriminatory action. The crucial importance of this participation may be shown, if further showing is needed, by this officer's positive testimony that the store manager, though at an earlier time he had said he wanted these Negroes out of his store, did not, at the actual time of the alleged offense, request their arrest or eviction (R. 16).

Beyond a doubt, what is shown here is a general scheme for dealing with sit-ins, in which the police played the role of initiators. Where the officer stands by and "requests" a private person so to frame his words as to make sure a "crime" has been or will be committed, it is absurd to talk of the mere neutral use of state machinery to enforce private discriminatory choice. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *Greenville*, 373 U. S. 244.

B. *The disorderly conduct convictions in the Barr case either rest on no evidence of guilt and deny due process under the doctrine of Thompson v. Louisville and Garner v. Louisiana, or violate the rule requiring fair warning as exemplified by Edwards v. South Carolina.*

The five petitioners in the *Barr* case were charged and found guilty of "breach of the peace" (S. C. Code §15-909) as well and separate fines were imposed for this offense. Nothing in the trial judge's oral ruling (R. Barr 41) indicates the facts thought to support the breach of the peace convictions. The Richland County Court said that this conviction was proper under S. C. Code §15-909 relating to "Disorderly Conduct, Etc.", and authorizing arrest and specified punishment for:

> Any person who . . . may be engaged in a breach of the peace, any riotous or disorderly conduct, open obscenity, public drunkenness, or any other conduct grossly indecent or dangerous to the citizens of such city or town or any of them. . . .

The Richland County Court held that the convictions could be based on the evidence that "the defendants refused to leave" after the management ordered them to leave—the same evidence which it held supported the trespass convictions (R. Barr 49). The South Carolina Supreme Court noted that the convictions were had under this statute, and that the exceptions on appeal charged a failure to prove a *prima facie* case and the *corpus delicti*, but refused to decide whether the offense was established, saying that these exceptions were "too general to be considered", failing to comply with the court's Rule 4, Section 6 (R. Barr 56).[41]

First, the thought that there might be an independent state ground precluding this Court's review of this particular objection to the breach of the peace convictions should be put out of mind. This is so because the South Carolina court clearly had the power to decide the issue presented by petitioners' exceptions, and simply exercised its discretion in refusing to do so, which does not preclude this Court's review. *Williams* v. *Georgia*, 349 U. S. 375. The South Carolina court's power is conclusively demonstrated by a series of decisions rendered before and after *Barr*. Indeed, shortly after the South Carolina court decided *Barr*,

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[41] Rule 4, Section 6 (Vol. 15, S. C. Code, 1962, p. 146) does more to discourage detailed and elaborate exceptions than to encourage them, providing:

> "*Section 6.* Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should *not* be long or argumentative in form." (Emphasis in original.)

Petitioners' brief in the court below did argue the facts and that the evidence showed merely that petitioners ignored the racially discriminatory command to leave without any evidence of violent, threatening, or otherwise disorderly conduct. And, of course, petitioners argued, in the brief as they had at the trial

it decided the *Bouie* case in which identical exceptions were made (R. Barr 51; R. Bouie 63), and not only considered the merits of the exceptions, but actually reversed Simon Bouie's conviction for resisting arrest on the ground that the elements of the offense were not proved. The court did the very same thing in an opinion filed the day before the *Barr* case as well; in *Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (Dec. 13, 1961), petition for certiorari pending as No. 8, October Term, 1963, the court considered the merits of exceptions identical to those in *Barr* and *Bouie* (see record in *Mitchell*, on file in this Court p. 78) and reversed convictions for interfering with an officer in the discharge of his duties on the ground that the evidence failed to support the convictions (239 S. C. at 393-395, 123 S. E. 2d at 520-521). In the *Mitchell* case, *supra*, the court reviewed the evidence in detail and concluded that it was insufficient to prove the offense; then the court made the following statement which faintly, but confusingly, foreshadowed the next day's pronouncement in *Barr*:

> What we have said disposes of the question of whether the evidence establishes the *corpus delicti* or proves a *prima facie* case against the appellants. We do not pass upon the question of whether this issue was properly before us for consideration. (Mitchell at 239 S. C. 395, 123 S. E. 2d at 521.)

To this abundant showing that the court has power to rule and actually exercises this power, it seems almost superfluous to add two more cases where the court ruled on exceptions identical to those here. This did occur nine

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(R. Barr 39-40), the claim that they were not guilty of any crime as a Fourteenth Amendment due process and equal protection claim. *Thompson* v. *Louisville*, 362 U. S. 199, was cited in the petition for hearing (R. Barr 58).

days before the *Barr* opinion in *State* v. *Edwards*, 239 S. C. 339, 123 S. E. 2d 247 (Dec. 5, 1961), rev'd *sub nom. Edwards* v. *South Carolina*, 372 U. S. 229, and a month before *Barr* in *Greenville* v. *Peterson*, 239 S. C. 295, 122 S. E. 2d 826 (Nov. 10, 1961), rev. *sub nom. Peterson* v. *Greenville*, 373 U. S. 244. So, at least four opinions roughly contemporaneous with that in *Barr* demonstrate that the South Carolina court has the power and authority to, and under its rules actually does, pass on exceptions worded identically to those which it refused to pass on in this case.

Williams v. *Georgia*, 349 U. S. 375, 389, which held that a state court's discretionary decision not to rule on a federal claim "does not deprive this Court of jurisdiction to find that the substantive issue is properly before [it]," is obviously controlling.

Turning to the *Barr* record, it is manifest that either no breach of the peace was proved, or that South Carolina's vaguely defined breach of the peace concept fails to give fair warning. One way or the other the convictions offend the due process clause.

Insofar as petitioners have ascertained, §15-909 has not been definitively construed in any reported decision and has never before been applied to conduct like that in this case. However, since the charge seems to rest on a portion of that statute relating to "breach of the peace" (and not upon any of its other provisions such as those relating to riotous or disorderly conduct, open obscenity, public drunkenness, or any other grossly indecent or dangerous conduct) the obvious place to turn for a meaning of "breach of the peace" under South Carolina law is to decisions on the common law crime of breach of the peace. This was recently defined in *State* v. *Edwards*, 239 S. C. 339, 123 S. E. 2d 247, rev'd *sub nom. Edwards* v. *South Carolina*, 372 U. S. 229.

In *Edwards*, the South Carolina court said that breach of the peace was an offense "which is not susceptible to exact definition" and that it included "a great variety of conduct destroying or menacing public order and tranquility" (239 S. C. at 343, 123 S. E. 2d at 249). The court then stated its approval of the definition of breach of the peace it quoted from 8 Am. Jur., Breach of the Peace, p. 834, §3:

> In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . ., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . .
>
> By "peace," as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society. (239 S. C. at 343-344, 123 S.E. 2d at 249.).

Petitioners' conduct here did not come within the framework of this definition. There was no showing of any act of violence and there was no showing of any act "likely to produce violence" if we exclude the possibility that the mere presence of Negroes in a place customarily frequented only by white persons is punishable as such a threat to the peace. That cannot be so because of the equal

protection clause. *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154; and *Wright* v. *Georgia*, 373 U. S. 284, make clear that the possibility of disorder by others cannot justify conviction of petitioners in such circumstances.

The South Carolina court's definition of breach of the peace contains nothing which suggests that a mere failure to obey a racially discriminatory command of the proprietor of a public accommodation to leave his premises is included within the definition, or that the crime is designed as a protection for this type of "property" claim. The only witness at the trial who asserted that petitioners "created a disturbance" was the store manager, Terry, and he regarded their conduct as entirely orderly (R. Barr 22) until the moment they sat down at the lunch counter (R. Barr 23-24). He did not claim that petitioners' response to his command to leave in any way "created any disturbance"; it was the mere act of sitting at the lunch counter, in violation of the segregation custom, which was thought to do this. The arresting officer, Mr. Stokes, gave no testimony that petitioners created a disturbance or that they did anything which created violence or disorder.

Thus, this case falls clearly within the rule of the *Thompson* and *Garner* decisions, *supra*, and the breach of the peace convictions should be reversed.

If it be considered that Section 15-909, by some loose and expansive construction, embraces petitioners' conduct, then the statute surely denies due process because of its vagueness. Petitioners' conduct was well within the *area* of constitutionally protected free expression, and whether or not it was expression fundamentally exempt from state prohibition, it certainly cannot be prohibited under a vague catch-all law. The First Amendment freedoms in-

clude non-verbal expressions as well as ordinary speech. Cf. *Stromberg* v. *California*, 283 U. S. 359. As Mr. Justice Harlan said, concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 207:

> The fact that . . . the management did not consent to the petitioners' remaining at the "white" lunch counter does not serve to permit the application of this general breach of the peace statute to the conduct shown . . . For the statute by its terms appears to be as applicable to "incidents fairly within the protection of the guaranty of free speech," *Winters* v. *New York*, *supra* (333 U. S. at 509), as to that which is not within the range of such protection. Hence such a law gives no warning as to what may fairly be deemed to be within its compass.

The threat which vague laws pose to the fragile right of free expression, and the settled principles holding such laws invalid are discussed more fully in Part II above. *Cantwell* v. *Connecticut*, 310 U. S. 296 and *Edwards* v. *South Carolina*, 372 U. S. 229, are controlling. Nothing need be added to what was said so recently in *Edwards*, *supra*, with respect to the obvious, and, indeed, self-confessed indefiniteness of South Carolina's crime of breach of the peace.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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APPENDIX A

A Discussion of Property Rights

The content of the term "property right" has greatly changed in the past two centuries. (See Powell on Real Property, Par. 746). If one looks far enough backward it could fairly be said that "he who owns may do as he pleases with what he owns." This is not the present law. The present law of land has hesitatingly embodied an ingredient of stewardship; which has grudgingly, but steadily, broadened the recognized and protected scope of social interest in the utilization of things. A property right no longer includes a privilege in the individual owner to act substantially to the detriment of his fellow citizens.

Felix Cohen, in one of his essays published in 1960 (The Legal Conscience at 41), refers to "property" as a "function of inequality." The germ of truth in this has present relevance for as demonstrated throughout this Appendix our law of property has been characterized by governmental redress of that inequality in so many instances that for the state to permit continuation of an inequality is tantamount to endorsing it as an expression of public policy.

So much of the American interposition for the modification of absolute property rights is both so well entrenched and so long accepted that we sometimes fail to recognize its full significance. Property consists mainly in (a) a power to dispose; and (b) a power to use. See Blackstone, Comm. I:138.

Both of these powers have been significantly curtailed in the centuries which are back of us. Both of these powers are likely to be further curtailed in the years just ahead.

The power to dispose of owned assets has been outstandingly cut down by (a) the rule against perpetuities; (b) the

law on illegal dispositions; and (c) the insistence upon formalities as prerequisites for full efficacy. Powell on Real Property ¶¶839-858.

Beginning in the late seventeenth century, the rule against perpetuities took final form after a gestation period of a century and a third as a magnificent judicially manufactured ingredient of the law designed to curb the power of the dead hand to rule the future. It placed outer limits of time on the power of the too often assumed all-wisdom of present owners. Powell on Real Property ¶762.

Rooted even more anciently in feudal practices, restraints upon the alienation of present interests earned invalidity. At one time, a feudal tenant could lose the hand, which derogated from the overlord's rights, by presuming to pen a deed of alienation. Modern thinking has made less drastic the prohibited forms of alienation and has made milder the penalties for overstepping established barriers; but the law as to illegal restraints on the alienation of property bulks large as restrictions upon what the owner of property can do with that which he believes he owns. Restatement of Property §§404-423. "Illegality" is broader than the restriction upon the alienability of property. Whenever a proposed provision is judged significantly to interfere with the long-time welfare of society, it encounters a stern prohibition. In general, these situations involve efforts by the owner of property to use the bait of wealth to control the conduct of his donees. Such attempts have been found illegal where the donor

a. has attempted to control or to preclude marriage; Restatement of Property §§424-427.

b. has attempted to shape an exercise of the power of testamentary disposition; Restatement of Property §§428-432.

c. has attempted to interfere with the religious behavior of the recipient; Restatement of Property §434.

d. has attempted to cause departures from normal familial relationships; Restatement of Property §433.

e. has sought to meddle with the education or life work of the recipients; Restatement of Property §436.

Such uses of wealth are potentially anti-social and hence have been found deserving of substantial curtailment.

More important than the power to dispose is the power to use. As one looks back over the centuries and decades preceding 1963, the ever advancing flow of social restrictions on the individual's exercise of his "privileges of use" becomes most impressive.

When the owner of a large parcel of land conveys an interior part, it is socially undesirable to have land which cannot be worked, and hence the conveyor is presumed to have granted an easement by necessity for access to and exit from the conveyed land. *Finn* v. *Williams*, 376 Ill. 95, 33 N. E. 2d 226 (1941). The otherwise existent power to enforce undisturbed possession is negatived, in part, by an implied easement grounded in social policy.

When Blackacre and Whiteacre are in the same locality, the owner of Blackacre may not so use his land as to lessen the reasonable enjoyment of Whiteacre by its owner or occupier. The twelfth century assize of nuisance, (McRae, "The Development of Nuisance in the Early Common Law," 1 U. Fla. L. Rev. 27 (1948)), began the curtailment of the privileges of use which was essential to the maintenance of a fair standard of neighborliness as between nearby land occupiers. Modern equity since the year 1800, has been making constantly new applications of the basic idea that one must so use his own as not to injure others. W. W. Cook, Equity in 5 Enc. of the Social Sciences, 582-586 (1931).

The law of waters, whether in streams, or on the surface, in underground springs, or lowering clouds, has as a backdrop the facts of nature. The amount and regularity of the rainfall, the geologic factors below the surface and the topographic configuration of the surface combine to determine the total moisture available to the several owners of affected land. Powell on Real Property ¶708. Considerations of social policy fix the scope of "reasonable use."

Courts repeatedly assert that property rights are, and always have been, held subject to the "police power"; that is the power of the government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners *whenever such restrictions are found to serve the health, the safety, the morals, the conservation of resources, or, the general welfare of the governed group.* On this basis, the "residential" character of neighborhoods has been protected from "mobile kitchens" (*Eleopoulos* v. *City of Chicago*, 3 Ill. 2d 247 (1954)); manufacturing areas have been protected from excessive noises (*Dube* v. *City of Chicago*, 7 Ill. 2d 313 (1956)), a statute of Virginia, compelling the connection of a private home with the city water works system, has been upheld (*Weber City Sanit. Comm.* v. *Craft*, 196 Va. 1140 (1955)). Sanitary legislation began as early as 1389 (Stat. 12 Rich. II, c. 13). Commissioners of sewers were established in 1430 (Stat. 8 Henry VI, c. 3). Building regulations received a large impetus from the Great Fire of 1666 in London. The importance of safeguarding "health" and "safety" gained new recognitions in the nineteenth century.

Building Codes are now a commonplace in almost every community. By 1951, some 2233 municipalities were listed as having such codes. Building Regulation Systems in the United States, 1951, published by the Housing and Home Finance Agency of the Division of Housing Research. See also Note, 6 Stanford L. Rev. 104, at 113 (1953). They estab-

lish specifications both as to the construction and use of buildings. Multiple dwellings and tenements have requirements as to plumbing, toilet facilities, air space per occupant and ventilation. No property owner is allowed to indulge his fancy for yard or piazza water closets (*City of Newark* v. *Chas. R. Co.*, 17 N. J. Super. 351 (1952)). Factories, in proportion to the number of workers employed, have requirements as to plumbing, ventilation and the minimizing of fire hazards, plus additional requirements dictated by the kind of work engaged in. Powell on Real Property ¶862. Similarly circumscribed as to permissible utilizations of their land are mercantile establishments. Special requirements exist as to steam boilers, elevators, fire escapes, fire proofing and modes of egress. Powell on Real Property ¶863.

In the field of morals, there has been a similar evolution. Profitable houses of prostitution are no longer the privilege of respectable property owners. Note, 24 Wash. L. Rev. 67 (1949). Obscene exhibitions incur remedial social action. *State ex rel. Church* v. *Brown*, 165 Oh. St. 31, 133 N. E. 2d 333 (1956). Gambling is generously frowned upon. See, for example, Iowa Code (1955) §99.1, injunction against gambling; §726.1, penalty for keeping a place for gambling; Mass. Ann. Laws (1955) c. 271, §§5A, 7, 8, 18 and 23. The desirable outer limits on police power regulation with respect to the public morals becomes less clear as doubts grow concerning the exact content of morality and the efficiency of courts or legislatures in compelling general morality. Powell on Real Property ¶864. See also Symposium on Obscenity and the Arts, 20 Law and Contemporary Problems, 531-688 (1955). The areas in which active debate is now observable concern chiefly gambling and sexual conduct. The fact remains that property owners have been, and can be, effectively debarred from any use of their

property found to offend public morals and such curtailment of "property rights" calls for no reimbursement of the owner so debarred.

In the wide open spaces of the West, there have been comparable developments. Soil conservation districts have adopted sometimes quite costly land use regulations which must be observed by all owners in the district. Parks, Soil Conservation Districts in Action 13, 147 (1952). Conformity has been assisted by the conditioning of land loans on prescribed social behavior. (Note, 1950 Wis. L. Rev. 716). In areas devoted to cattle raising, individual owners are prevented from making short-term gains by overgrazing. Penny and Clawson, "Admin. of Grazing Distr.," 29 Land Econ. 23 (1953), This has been accomplished in some areas by conditioning permits to use public lands needed for grazing on the applicant having used his privately owned land in a manner preserving its long-term value. (See Federal Taylor Grazing Act, 43 M. S. C. A. §315 and the Montana Grazing Act, Mont. Rev. Code 1947, §§46-2382). Thus private ownerships are curtailed in their uses of their "owned land" so as to assure adequate continuing supplies of forage. Rural zoning to preserve timber and to accomplish reforestation of cutover areas not only serve the desirable ends of conservation, but also serve the collateral purpose of restoring local tax revenues by returning land to the growing of timber and delaying the need for as yet unbearable expenses for local roads and school maintenance (See Washington's Forestry Practices Act, discussed in *State of Washington* v. *Dexter*, 32 Wash. 2d 551 (1949); Solberg, "Rural Zoning in the United States," Agric. Inform. Bull. No. 59 (1952)).

Courts and legislatures have resorted to the "police power"—the general welfare of the group—in problems involving renters (41 Stat. 298 (1919), constitutionality sustained in *Hirsh* v. *Block*, 256 U. S. 135; N. Y. Laws 1920 cc.

131-139, constitutionality sustained in *New York ex rel. Brixton Operating Corp.* v. *La Fetra*, 230 N. Y. 429, 130 N. E. 601, affd. 257 U. S. 665; see also Powell on Real Property ¶252) and borrowers (Powell on Real Property ¶¶471-474).

The objectives of zoning center on the promotion of the welfare of the community. It has become established since 1925 that the "property rights" of any land owner are subordinate:

a. to the establishment of residential areas in which relaxation and relative tranquility can be enjoyed, and in which there will be absent the vibration, noise, smoke, odors, fumes and bustle of industry and commerce; *Village of Euclid* v. *Ambler R. Co.*, 272 U. S. 365; McQuillan, Mun. Corp. (3d Ed.) 1950, §§25.07, 25.96-25.109; Toll Zoning for Amenities, 2 Law and Contemp. Prob. 266 (1955).

b. to the establishment of areas devoted to the provision of goods and services without an intermixture of more offensive uses; *Bartram* v. *Zon. Com. of Bridgeport*, 136 Conn. 89, 68 A. 2d 308 (1949); *Town of Marblehead* v. *Rosenthal*, 316 Mass. 124, 55 N. E. 2d 13 (1944),

c. to the social need for controlling densities of population so that the public services of transportation, policing, fire protection, water and power supply and waste removal can be efficiently rendered. Symposium, 20 Law and Contemp. Problems 197, 238, 481 (1955).

These decisions embody a pragmatic reconciliation of the conflicting pulls of the constitutional guarantee that private property shall not be taken without compensation and the underlying police power of any government to serve the social welfare. The transitional judicial thinking on this

subject is well illustrated by contrasting the District Court in *Schneider* v. *District of Columbia,* 117 F. Supp. 705 (1953), with the ultimate decision of the same case, *Berman* v. *Parker,* 348 U. S. 26.

As early as 1945, Mr. Justice Jackson in stressing the control of private rights by consideration of social concern (*U. S.* v. *Willow River Power Co.,* 324 U. S. 499) had said:

> "Only those economic advantages are 'rights' which have the law back of them . . . whether it is a property right is really the question to be answered . . . .
>
> "Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right or perhaps it would be more accurate to say that as against the Government, such private interest is not a right at all."

And see Cross, "The Diminishing Fee," 20 Law and Contemp. Prob. 517 (1955).

Thus, the subjection of property rights to competing claims is irrevocably embedded in our law. The nature of the claim to be free from racial segregation is so compelling, and, today, so clear, that no property owner can be heard to say that his "inalienable," "sacred," right to discriminate is somehow immune from this normal process and must be sanctioned and enforced by law. If anything, an owner should expect that the element of stewardship with which all property is impressed, carries with it an obligation, which the law will recognize, not to employ one's public facilities in a way which injures and humiliates a large portion of the public.

Where, alas, has gone the "liberty" of property owners to maintain and to operate structures which smell to high heaven, which are destructive of the lives, or health, or safety, or welfare of customers and workers? Just where it was bound to go! Into the limbo. By the curtailment of these "liberties" there has been assured the larger liberty of society as a whole.

APPENDIX B

Survey of the Law in European and Commonwealth Countries

1. *France*

Article 184, paragraph 2, of the French Penal Code, the only provision that relates to occurrences showing some resemblance to sit-ins, declares punishable the entry, with the aid of threats or violence, of the domicile of a co-citizen. It would be inapplicable to conduct involved in the case at bar for two reasons: First, an essential element of the crime is the use of threats or violence; second, a place of public accommodation does not qualify as "*domicile*" as that term is used in article 184(2).

In France, a peaceful sit-in, rather than commit a crime, has a statutorily protected right to be served. According to Decree No. 58-545 of June 24, 1958 (*Journal Officiel* of June 25, 1958), every person engaged in commercial activities (*commerçant*) is prohibited, on penalty of imprisonment and/or fine, from refusing service to a person who in good faith requests that it be rendered, if the *commerçant* is able to render the service in accordance with normal commercial customs and no law forbids him from rendering it. Although, in the absence of practices of racial discrimination, this provision has never been applied to situations similar to those presented in the present case, its broad language would appear to make escape from its prohibitions impossible.

2. *Italy*

In Italy, as in France, the penal provision protecting the home against unlawful entry does not cover peaceful sit-ins in places of public accommodation. Article 614 of

the Italian Penal Code makes criminal only entry of a home (*abitazione*) or other private residence (*luogo di privata dimora*) against the will of the person who has the right of exclusion, and does not apply to places of public accommodation.

Furthermore, in Italy, the peaceable sit-in would have a right to be served. Article 1336 of the Italian Civil Code, entitled "offer to the public at large" ("*offerta al pubblico*"), provides that unless circumstances or usage indicate otherwise, an offer to the public at large may be accepted by any member of the public. A term in the offer or contract excluding Negroes would be disregarded as violative of Italian public policy. Italy's policy against racial discrimination is firmly embedded in Article 3 of its Constitution, providing that all citizens are equal regardless of sex, race, language, religion, political conviction, or personal or social standing.

3. *Belgium*

Article 439 of the Belgian Penal Code declares punishable the entry of a home, apartment, room or lodging inhabited by someone else against the latter's will, if the entry is made with the aid of threats or violence against persons, or by breaking, climbing in, or with false keys. Article 442 of the same code similarly declares punishable whoever has entered any of the places specified in article 439 without the consent of the owner or the tenant and is found there during the night. Neither of these articles apply to peaceful sit-ins, since (1) they are designed to protect only a person's home or residence and not places of public accommodation and (2) peaceful sit-ins do not involve nocturnal visits and are, by definition, neither accompanied by threats or violence nor effectuated by breaking or climbing in or by using false keys.

It is unclear whether in Belgium a peaceful sit-in would have the right to be served. The answer would seem to depend in part on whether Article 6 of the Belgian Constitution, which provides that all Belgians are equal before the law, also applies to individual, as distinguished from governmental, action. If it does, the answer would be in the affirmative.

4. *The Netherlands*

Article 138, paragraph 1, of the Dutch Penal Code declares punishable whoever unlawfully enters the home or the premises or homestead of someone else or whoever unlawfully staying there refuses to leave. Prominent Dutch authority supports the view that this provision affords protection not only against unlawful invasion of the home, but also against unlawful entry of other premises, including places of public accommodation. See, *e.g.*, 2 *Van Bemmelen & Van Hattum, Hand-en Leerboek van het Nederlandse Strafrecht* 164-65 (The Hague-Arnhem 1954). Nevertheless, this article would not outlaw peaceful sit-ins, since the entry and refusal to leave of sit-ins cannot be characterized as "unlawful." Every owner of a place of public accommodation extends an offer of service to members of the public. A term in his offer limiting it to members of a particular racial group would not be given effect as being against public policy. As a result, a Negro accepting the offer would obtain a right to be served. Since that right would render his entry and refusal to leave lawful, he would not come within the ambit of article 138. The operative Dutch public policy is embodied in Article 14 of the European Convention on Human Rights to which The Netherlands is a party and which prohibits discrimination on the ground of race.

Since a Negro, by accepting the offer of the owner of the place of public accommodation, in effect concludes a contract, he would, in Holland, have a civilly protected right to be served.

5. *Norway*

Article 355 of the Norwegian Penal Code is similar to the corresponding Dutch provision in that it outlaws unlawful entry not only of the home but also of a "vessel, railroad car, motor vehicle or aircraft, or a room in any of these or in any other enclosed place." As a consequence, it would seem to protect against "unlawful" entry of places of public accommodation. Nevertheless, for the same reasons as those elaborated in the discussion of Dutch law, the entry and refusal to leave of a Negro sit-in would not be "unlawful" and therefore not come within the ambit of article 355.

Furthermore, in Norway, a peaceful sit-in would have a right to be served. The existence of this right follows from general principles of contract law, under which the person who exploits a place of public accommodation extends an offer of service to the public at large which may be accepted by a Negro, who may disregard as violative of public policy an exclusion based on race embodied in the offer. Indeed, a person who refuses service solely on the ground of race of the person who requests it may well come within the compass of Article 246 of the Norwegian Penal Code which declares punishable anyone who unlawfully, in word or deed, offends another person's feeling of personal honor.

6. *Germany*

Article 123 of the German Penal Code declares punishable unlawful entry not only of the home, but also of commercial premises (*Geschäftsräume*). It similarly makes it a crime for someone who has no right to be there to refuse to leave these places upon demand by the person entitled to their use and possession. There is no doubt that the broad language of this provision also covers places of public accommodation. Nevertheless, a peaceful sit-in would not come within the compass of its prohibitions.

It is an essential element of the crime of article 123 that the person who has entered the premises has done so unlawfully or stays on the premises without having a right to be there. In the case of a peaceful sit-in, that essential element would be lacking. Two grounds support this conclusion.

Article 3, paragraph 3, of the German Constitution provides that nobody may be granted a disadvantage or advantage because of his sex, birth, race, language, nationality and origin, belief, or religious or political opinions. Although there is a division of opinion among Germany's legal scholars and the problem has not yet been resolved explicitly by the German constitutional court, German scholars of great prominence as well as the first Senate of the Federal Labor Court hold this constitutional mandate to be directed not only to public officials, but also to private individuals. See, *e.g.*, *Leisner, Grundrechte und Privatrecht* 332-53 (Munich 1960); Nipperdey and Boehmer in 2 *Neumann, Nipperdey & Scheuner, Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte* 20, 422 (Berlin 1954); *S. H.* v. *M. L. F.*, December 3, 1954, 1 *Entscheidungen des Bundesarbeitsgerichts* 185 (1954); *Landkreis U.* v. *Schwester K.*, March 23, 1957, 4 *Entscheidungen des Bundesarbeitsgerichts* 240 (1957). If it does circumscribe the permissible conduct of individuals, there is no doubt that a

refusal of service and a demand to leave the premises based merely on race is in violation of the German Constitution and cannot be given the effect of making unlawful the sit-in's entry of, and presence on, the premises.

However, even if the constitutional provision would not address itself directly to individuals, the sit-in's entry and presence would not be unlawful. Although older authority seems to support the view that places of public accommodation cannot be regarded as extending an offer to the public at large and do no more than invite the public to make an offer, consisting of a request for service, the modern opinion, supported by prominent and most authoritative German scholars, is that the question of whether a place of public accommodation extends an offer to the public must be answered in accordance with the circumstances of the individual case. For the modern view, see 1 *Erman, Handkommentar zum Bürgerlichen Gesetzbuch* 217-218 (3d ed. Westfalen 1962); *Palandt, Bürgerliches Gesetzbuch* 116 (21st ed., Munich and Berlin 1962); 1 *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 878 (11th ed. by Brändl & Coing, Berlin 1957). This opinion, which favors the finding of an offer, would clearly give the peaceful sit-in, who accepted the offer by entering and ordering, a contractual right to remain on the premises and to be served. Furthermore, even if the sit-in's right to enter, to remain on the premises, and to be served could not be based on a contract, it could be grounded on general principles of tort law. According to Article 826 of the German Civil Code, every act that is *contra bonos mores* (*gegen die guten Sitten*) constitutes a tort that creates a claim for compensation of the damages it causes. There is no doubt that a refusal to give service based on discrimination against the customer's race alone would violate standards of proper conduct generally accepted in Germany and therefore constitute a tortious act. Even those

who oppose the direct applicability of Article 3, paragraph 3, of the German Constitution to private individuals agree that its provisions make clear to what norms an individual's conduct in society must conform. Since article 826 imposes on the place of public accommodation the obligation not to refuse service merely on the basis of the customer's race, the customer would have the corresponding right to enter and remain on the premises. Clearly, the customer's entry and remaining on the premises would be measures designed to protect himself against the unlawful discrimination practiced by the place of public accommodation. Since Article 227 of the German Civil Code provides that a measure that is necessary to defend oneself against an unlawful act is lawful, the customer would undoubtedly be acting lawfully by entering and remaining on the premises.

7. *England and the Commonwealth Countries*

In England, a "sit-in" would seem to be non-criminal, because the criminal trespass laws there require force.[1]

In four provinces of Canada, Fair Accommodation Practices Acts prohibit racial discrimination in public accommodations.[2] In the remaining provinces, it is doubtful whether the criminal law would reach this activity.[3]

In India, racial discrimination in public accommodations is prohibited by the Constitution.[4]

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[1] 10 Halsbury, Laws of England, Criminal Law §1100 (3d. ed. 1955); *Rex* v. *Bake*, 3 Burr. 1731, 97 Eng. Rep. 1070 (K. B., 1765); *Rex* v. *Wilson*, 8 Term Rep. 357, 101 Eng. Rep. 1432 (K. B., 1799); *Rex* v. *Smyth*, 5 C & P 201 (1832).

[2] Saskatchewan Statutes 1956, c. 68; Ontario Statutes 1954, c. 28, as amended by Statutes 1960-61, c. 28; New Brunswick Acts 1959, c. 6; Manitoba Acts 1960, c. 14.

[3] The closest law would seem to be the Malicious Damage Statute, Martin's Criminal Code (1961), Section 372 (1). But the requisite elements of damage would seem to be lacking here.

[4] Constitution of India, Article 15(2).

In Pakistan, the abrogation of the Constitution of 1956 by presidential proclamation in October, 1958 apparently struck out a constitutional right[5] to nondiscriminatory treatment. When the Constitution is fully restored this Right will be effective. However, a "sit-in" would appear not to come within the scope of existing criminal statutes.[6]

In Australia, there are either no state criminal trespass statutes[7] or state statutes which would not reach "sit-ins".[8]

In New Zealand, a "sit-in" might be criminal,[9] but there have been no reported cases of a factually similar nature.

In Ghana[10] and Nigeria,[11] freedom from racial discrimination is a constitutional right.

Only in the Union of South Africa would it be clear that a "sit-in" was criminal[12]—and here, significantly, the racial element is a factor in constituting the crime.

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[5] Article 14, Constitution of 1956.

[6] The requisite intent would appear to be lacking for a violation of the criminal trespass statute, Pakistan Criminal Code, s. 441. *Rahmatullah* v. *State*, 1958 P. L. D. Dacca 350.

[7] Western Australia and Queensland.

[8] The statutes in New South Wales (Inclosed Lands Protection Act, 1901-1939, s. 4) and Southern Australia (Trespassing on Lands Act 1928) apply only to "inclosed lands"—a very restrictive category. See 23 Australian Law Journal 357 (1949). Victoria's statute—Police Offenses Act 1958, s. 20(3)(d)—provides the defense of "supposition of right": See *Martin* v. *Hook*, 5 A. L. R. 6 (1899). Tasmania's statute—Trespass to Lands Act 1862—provides the defense of "reasonable excuse"; additionally, it may not be applicable to an urban setting.

[9] Police Offenses Act 1927, s. 6A; inserted by Police Offenses Amendment Act (No. 2) 1952, s. 3.

[10] Constitution of Ghana, Article 13, Declaration of Fundamental Principles.

[11] Constitution of Nigeria, Chap. III, Fundamental Rights, s. 27.

[12] Reservation of Separate Amenities Act, Act No. 49 of 1953, 3, Section 2(2), making it an offense for a person of one race wilfully to enter public premises or a public vehicle set aside for members of another race.

BRIEF FOR RESPONDENT

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In The

Supreme Court Of The United States

OCTOBER TERM, 1963

No. 9

CHARLES F. BARR, et al., PETITIONERS,

vs.

CITY OF COLUMBIA

No. 10

SIMON BOUIE and TALMADGE J. NEAL, PETITIONERS,

vs.

CITY OF COLUMBIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR RESPONDENT CITY OF COLUMBIA

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT

These cases arise out of convictions of the Petitioners in the City Recorder's Court in Columbia, South Carolina, for trespass and breach of the peace in connection with "sit-in" demonstrations at the lunch counters of two private drug stores. The relevant facts in each case are quite similar and, for the most part, are fully summarized in the opinions of the South Carolina Supreme Court, from which we quote.

1. *Barr v. City of Columbia*

"The charges grew out of a 'sit-down' demonstration staged by appellants at the lunch counter of the Taylor

Street Pharmacy in the City of Columbia, a privately owned business. In addition to selling articles usually sold in drug stores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

"Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you 'could have heard a pin drop in there', and that 'everyone was on pins and needles, more or less, for fear that it could possibly lead to violence.' He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

"The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch coun-

ter stated to them, 'You might as well leave because I ain't going to serve you', which they did not construe as [fol. 66] a specific request. [Barr R. 26, 29, 32-33] They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: 'Get up, we will get them out of here.' [Barr R. 25]" *Columbia v. Barr*, 239 S. C. 395, 397, 123 S. E. (2d) 521, 522, 523.

In addition, the two Petitioners testified that they had previously made purchases in the store, Barr R. 25, 34, and one said he had purchased food at the lunch counter to take out. Barr R. 34. Both stated that on this occasion their sole purpose in entering the store was to be served food at the counter. Barr R. 25, 31, 36.

Based on this evidence, the Petitioners were convicted of Trespass under Sec. 16-386 of the 1952 Code of Laws of South Carolina and Breach of the Peace under Sec. 15-909 of the 1952 Code of Laws of South Carolina. Each was sentenced to pay a fine of $100.00 or serve 30 days in jail on each charge, with $24.50 of each fine being suspended. Barr R. 42. The Richland County Court affirmed the conviction. Barr R. 46-51. The South Carolina Supreme Court refused to consider, as too vague, exceptions directed to the merits of the convictions. Barr R. 55-56. That Court affirmed the lower Court's decision on the question of whether the City's actions denied Petitioners equal protection under the Fourteenth Amendment. Barr R. 56. *Columbia v. Barr*, 239 S. C. 395, 123 S. E. (2d) 521.

2. *Bouie v. City of Columbia*

"The appellants Simon Bouie and Talmadge J. Neal, Negro college students, were arrested on March 14, 1960, and charged with trespass (Code 1952, Section 16-386 as amended) and breach of the peace (Code, 1952, Section

15-909). Bouie was also charged with resisting arrest. On March 25, 1960, they were tried before the Recorder of the City of Columbia, without a jury. Both were found guilty of trespass; Bouie guilty also of resisting arrest. Bouie was sentenced to pay a fine of one hundred ($100.00) dollars or to imprisonment for thirty (30) days on each charge, twenty-four and 50/100 ($24.50) of each fine being suspended and the prison sentence to run consecutively. Neal was sentenced to pay a fine of one hundred ($100.00) dollars, of which twenty-four and 50/100 ($24.50) was suspended, or to imprisonment for thirty (30) days. On appeal to the Richland County Court the judgment of the Recorder's Court was affirmed by order dated April 28, 1961, from which this appeal comes.

"Eckerd's, one of Columbia's larger drugstores, in addition to selling to the general public drugs, cosmetics and other articles usually sold in drugstores, maintains a luncheonette department. Its policy is not to serve Negroes in that department.

"On March 14, 1960, about noon, the appellants entered this drugstore and sat down in a booth in the luncheonette department for the purpose, according to their testimony, of ordering food and being served. Neal testified that it was his intention to be arrested; [Bouie R. 35] Bouie testified that he knew of the store's policy not to serve Negroes in that department, and that it was his purpose also to be arrested 'if it took that'. [Bouie R. 45] No employee of the store approached them, and they continued to sit in the booth for some fifteen minutes, each with an open book before him, when the manager of the store came up, in company with a police officer, told them that they would not be served, and twice requested them to leave. Upon their ignoring such request, the police officer asked them to leave, which request brought no result other than the query 'for what' from Bouie. The police officer then told them to leave and that they were under arrest. Thereupon Neal closed his book and got up; Bouie did not, and the

officer thereupon caught him by the arm and lifted him out of the seat. Bouie's book being still on the table, he was permitted to get it; and the officer then seized him by the belt and proceeded to march him out of the store. Bouie testified that he made no resistance, but only said to the officer when the latter had hold of his belt, 'That's all right, Sheriff, I'll come on'. [Bouie R. 42] The officer testified that Bouie said: 'Don't hold me, I'm not going anywhere', and that after they had proceeded a few steps he 'started pushing back and said "Take your hands off me, you don't have to hold me.'" [Bouie R. 4] *Columbia v. Bouie*, 239 S. C. 570, 572, 573, 124 S. E. (2d) 332.

The South Carolina Supreme Court reversed the conviction of Bouie for resisting arrest and affirmed both trespass convictions. *Columbia v. Bouie*, 239 S. C. 570, 574, 124 S. E. (2d) 332, 333.

SUMMARY OF ARGUMENT

I

Neither the action of the City of Columbia in arresting and convicting the Petitioners for trespass or for breach of the peace nor the action of the South Carolina Courts in affirming these convictions deprived any petitioner of equal protection.

The conduct of the Proprietors of privately owned drug stores in limiting service at its lunch counters to members of one race and in declining counter service to those of another race "* * * does no violence to the Equal Protection Clause." *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722. The action of City or State officers in arresting Petitioners after they have violated the state trespass and breach of peace statutes by refusing to leave privately owned property, after timely requests from the Proprietors to leave, does not make the state a participant in the Proprietors' decision not to serve the Petitioners at its lunch counters.

The use of the judicial machinery of the state in convicting Petitioners of trespass and breach of the peace does not constitute state action denying the Petitioners equal protection within the meaning of *Shelley v. Kraemer*, because in *Shelley* the state court participated in the decision to discriminate by choosing to enforce the racial covenant rather than the Negro plaintiff's property right, while in *Barr* and *Bouie* the decision not to serve the Petitioners was made by private individuals.

The commands of the Fourteenth Amendment do not require a state to prohibit private discrimination by its citizens.

II

In order for the Court to consider the question of whether a state statute is so vague as to deprive a defendant in a criminal case of due process of law or the question of whether the evidence was sufficient to convict the questions must have been raised and preserved in the state court. "This Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law." *Edelman v. California*, 344 U. S. 357.

III

The evidence presented in both *Barr* and *Bouie* was sufficient to support the convictions of each of the Petitioners for trespass and for breach of the peace.

ARGUMENT

I

THE CONVICTIONS OF THE PETITIONERS FOR TRESPASS AND BREACH OF THE PEACE BY THE CITY OF COLUMBIA DID NOT DENY TO THE PETITIONERS THE EQUAL PROTECTION OF THE LAWS BECAUSE THE CITY DID NOT PARTICIPATE IN THE DECISION OF THE DRUG STORE OWNERS TO LIMIT THEIR FOOD COUNTER SERVICE TO PERSONS OF ONLY ONE RACE

a. *The record is free of any evidence of discrimination by the City in the use of its police powers, or the State in the employment of its judicial system, with respect to the Petitioners.*

The record is completely void of any evidence of discrimination by the City in the use of its police powers to enforce the Trespass Statute. To the contrary, the evidence clearly indicates that Petitioners were arrested because of their status as trespassers, not because of their race.[1]

Certainly, there is no evidence of any deliberate or intentional discrimination against Negroes in enforcing the Trespass Law, which this Court has heretofore found necessary to constitute a denial of equal protection.

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination . . . [A] discriminatory purpose is not presumed [citations omitted]. There must be a showing of "clear and intentional discrimination." . . . [A] mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Snowden v. Hughes*, 321 U. S. 1, 8-9.

In the absence of such a showing, good faith of the police officers in the administration of their duties is presumed. *Sunday Lake Iron Company v. Wakefield*, 247 U. S. 350; *Barbier v. Connolly*, 113 U.S. 27.

Petitioners have made no showing that the Trespass Law (admittedly fair on its face, Pet. Br. p. 44) either has been or would have been enforced differently as to others, regardless of their race, similarly situated who refused to leave the

[1] Q. Chief, did you personally have any objection to these defendants sitting where they were seated?
A. Personally, no.
Q. So it didn't make any difference to you where they sat?
A. No sir, not from a police standpoint. (Bouie 15)

See also Barr 6, 13, 16.

premises on the Proprietor's request. Absent such a showing, neither the statute itself nor the City's enforcement can be deemed in violation of Petitioners' rights under the Fourteenth Amendment. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U. S. 37; *Western Turf Association v. Greenberg*, 204 U.S. 359.

Nor is there any merit in Petitioners' suggestion that the law would not be equally effective in its operation as to other similarly situated. (Pet. Br. p. 44) Clearly, a white person in Petitioners' position would be subject to prosecution. In any event, a "claim of repugnancy to the equality clause cannot be supported by mere speculation or conjecture." *Hodge Drive-It-Yourself Company v. Cincinnati*, 284 U. S. 335, 338. See also *Queenside Hills Realty Company v. Saxl*, 328 U. S. 80.

Finally, there is no evidence of a denial of "equal protection" or "due process" in the prosecution of the charges against the Petitioners through the courts of South Carolina. In each case Petitioners were awarded a complete and impartial hearing at every level of the State judicial machinery.

Thus, the record is free of any evidence of a denial of equal protection by the City or the State in the enforcement of the South Carolina Trespass Act.

b. *The City's protection of the rights of Proprietors under its police powers violated none of the rights preserved for Petitioners under the Fourteenth Amendment.*

(1) The private decisions of the Proprietors to refuse service to the Petitioners, whether or not discriminatory, lie within the permissive bounds of the Fourteenth Amendment.

The decisions of the Proprietors to refuse service to Petitioners in their private establishments were made as private citizens. Since its enactment, this Court has consistently and repeatedly construed the Fourteenth Amendment as never having been intended to prohibit such private choices, whether or not discriminatory.

> Its [Fourteenth Amendment] sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, *neither more nor less*, shall be the measure of the rights of the citizens of other states within your jurisdiction. *Slaughterhouse Cases*, 16 Wall 36, 77. [Emphasis added.]

> The Fourteenth Amendment prohibits a State from depriving any person of life, liberty or property, without due process of law; *but this adds nothing to the rights of one citizen against another. U. S. v. Cruikshank*, 92 U. S. 542, 554.[2] [Emphasis added.]

Among its first decisions after the enactment of the Fourteenth Amendment, this Court was faced with the identical question raised here—the extent of the right of proprietors of private establishments, under that Amendment, to discriminate if they saw fit among their customers. In *The Civil Rights Cases*, 109 U. S. 3, this Court squarely decided that proprietors of private establishments had every right, under the Fourteenth Amendment, to choose their customers on any basis they saw fit, whether or not discriminatory or wrongful, and, in so holding, said:

> In this connection it is proper to state that civil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. *The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual* . . . p. 17 [Emphasis added.]

[2] See for example *Civil Rights Cases*, 109 U. S. 3; *Marrone v. Washington Jockey Club*, 227 U. S. 633; *Buchanan v. Warley*, 245 U. S. 60; *Burton v. Wilmington Parking Authority*, 365 U. S. 715; *Turner v. City of Memphis*, 369 U. S. 19; *Peterson v. City of Greenville*, 373 U. S. 244.

That this case is controlling of the issues raised as to the violation of the Petitioners' "equal protection" rights under the Fourteenth Amendment is recognized in their request that it be overruled as to this holding. However, its continuing force and validity was reiterrated as recently as April 1961 when, in the language of Justice Clark, this Court said:

> The Civil Rights Cases . . . "embedded in our constitutional law" the principle that the action inhibited by the first Section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . . Burton v. Wilmington Parking Authority*, 365 U. S. 715, 721. [Emphasis added.]

This right of the private proprietor to determine his customers has been sustained by this Court on several occasions. *Terminal Taxicab Company v. Kutz*, 241 U. S. 252 (private automobile leasing business per Justice Holmes); *Marrone v. Washington Jockey Club*, 227 U. S. 633 (race track proprietor); *Western Turf Association v. Greenberg*, *supra* (race track proprietor). Likewise, other courts have consistently upheld the proprietor's right, under the Fourteenth Amendment, to discriminate among his customers. *Slack v. Atlantic White Tower System, Inc.*, 284 F. 2d 746 (4th Cir. 1960) affirming 181 F. Supp. 124 (D. Md. 1960); *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959); *State v. Clyburn*, (N. C. 1958), 101 S. E. 2d 295; *Madden v. Queens County Jockey Club*, (N. Y. 1947), 72 N. E. 2d 697; *Alpaugh v. Wolberton*, (Va. 1946); 36 S. E. 2d 906; *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960). See also *Terrell Wells Swimming Pool v. Rodriquez*, (Tex.) 182 S.W. 2d 824; *Booker v. Grand Rapids Medical Colleve*, 156 Mich. 95, 120 N.W. 589; *Younger v. Judah*, 111 Missouri 303, 19 S. W. 1109; *Goff v. Savage*, 122 Wash. 194, 210 P. 374; *De La Ysla v. Public Theatres Corporation*,

82 Utah 598, 26 P. 2d 818; *Brown v. Meyer Sanitary Milk Company*, 150 Kan. 931, 96 P. 2d 651; *Horn v. Illinois Central Railroad Company*, 327 Ill. App. 498, 64 N. E. 2d 574; *Coleman v. Middlestaff*, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; *Fletcher v. Coney Island*, 100 Ohio App. 259, 136 N. E. 2d 344. Annotation, *Right to Reject Customer from Store*, 9 ALR 379.

Even in its decisions of the previous term, which extend the doctrine of "state action" to its outermost limits, this Court was careful not to infer that the proprietor's right to refuse service was in any way restricted under the Fourteenth Amendment. *Avent v. North Carolina*, 373 U. S. 375; *Gober v. The City of Birmingham*, 373 U. S. 277; *Lombard v. Louisiana*, 373 U. S. 267; *Peterson v. City of Greenville*, 373 U. S. 244. Instead, the Court was careful, in each case, to ground its decision on a state statute, city ordinance, or other official action which effectively prevented the free exercise of private choice. The records here are devoid of such state or official restriction on the private decisions of the Proprietors.

Petitioners recognize this fatal absence of any state or official coercion in these records and seek to substitute, in lieu thereof, as restricting such free choice, "custom." (Pet. Br. 25-33) This "custom" they would, in turn, trace to state law for its source and origin, thereby finding state "coercion" of the Proprietors in their decisions not to serve the Petitioners. Examination of this novel doctrine reveals its weaknesses.

> The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. Soper, Circuit Judge. *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845, 848.

Furthermore, the record contains absolutely no evidence of any widespread "custom" of discrimination at lunch counters in the City of Columbia which can be traced to

state law.[3] None of the South Carolina statutes cited by Petitioners (Pet. Br. p. 30) require such segregation and no discriminatory requirements can be found in the City of Columbia Ordinances.[4] Nor have Petitioners cited any pre-existing Acts of the South Carolina Legislature which could have constituted the origin of such "custom."[5] In fact, the record shows that Petitioners were, and had been for some time, freely served in other departments of the Proprietors' stores and had received food at the lunch counters to take out. (Barr R. 25, 34. Bouie R. 27, 43).[6]

Even if such a "custom" did exist, among the basic precepts of our jurisprudence are those which recognize that custom is one of our principal *sources* of law, *U. S. v. Arredonlo*, 6 Pet. 691, 714-715; 15 CJS 616, and that our democratic governments and their laws are *the products of the choices* of our citizens, not vice versa as Petitioners contend. (Pet. Br. p. 28) While Petitioners' proposition might be true in the case of some modern totalitarian systems, the reverse is not yet true under our democratic structure. Certainly, to attribute to the state, in the absence of any affirmative State coercion, the Constitutional responsibility for the private decisions of its citizenry, if concurred in by sufficient number to constitute a "custom" would indeed

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[3] Clearly, the existence of a City Ordinance in the Town of Greenville, South Carolina, does not create a "custom" in Columbia, as Petitioners suggest. (Pet. Br. p. 29-30)

[4] Petitioners' authorities would indicate that no such custom ever existed (Pet. Br. p. 28-29)

[5] In this connection, Petitioners would attribute to the City the responsibility of any pre-existing state legislation on the subject of segregation, even though no longer in effect. (Pet. Br. p. 26)

[6] If such "custom" exists, Petitioners would place the burden on the Proprietors to prove that their choice was not because of "custom"— i.e., that the Proprietors' preferences were for personal reasons, and not because of the concurrence of the majority of their fellow citizens. But what basis of such a decision to refuse Petitioners service could be more "personal" to a proprietor of a restaurant or lunch counter than that of the business success of his undertaking, which must necessarily reflect the preferences of a majority of his customers. In any event, such an approach is in conflict with the long established presumption of the Constitutionality of the conduct in question. See e.g.; *Hernandez v. Texas*, 347 U. S. 475; *Snowden v. Hughes, supra; R. H. Stearns Company v. U. S.*, 291 U. S. 54; *U. S. v. Chemical Foundation*, 272 U. S. 1; *Quinlan v. Green County*, 205 U. S. 410, *Louisiana v. Texas*, 176 U. S. 1; *Turner v. Yates*, 16 Howard 14.

" . . . transfer the security and protection of all civil rights which we have mentioned from the states to the federal government . . ." and "fetter and degrade the state governments by subjecting them to control of Congress, and the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . " and further " . . . radically change[s] the whole theory of the relations of the state and federal governments to each other and of both these governments to the people . . . ", a step which this Court has refused to take. *Slaughterhouse Cases*, 16 Wall 36, 77-78.

However, even if we assume the correctness of the Petitioners' proposition that the state is responsible for the "customs" of its people, what Petitioners are really saying is that if a majority of the citizens of a given locality concur in the Proprietors' private decisions, then those decisions are not of the Proprietors' free choice, but are rather the result of "state action" (or inaction), and therefore, if based on racial considerations, prohibited by the Fourteenth Amendment. If, however, those decisions are not concurred in by sufficient members of the locality such as to be deemed a "custom," even though they be based on considerations of racial discrimination, then they lie within the permissible bounds of the Fourteenth Amendment.

We respectfully submit that no such result was ever intended by the framers of the Fourteenth Amendment and that nothing therein prohibits the private decisions of the Proprietors reflected in these records in no way influenced by the State of South Carolina or the City of Columbia.

(2) The use of the City's police powers, on a non-discriminatory basis to protect the property rights of its citizens from unlawful trespass is consistent with the commands of the Constitution of the United States and the denial of such protection, solely because of a customer's race, is forbidden by the Fourteenth Amendment.

Beyond question, the businesses of the lunch counter proprietors constitute property rights in every sense, entitled to protection from unlawful injury or interference. *Truax v. Corrigan*, 257 U. S. 312; *Duplex Printing Press Company v. Deering*, 254 U. S. 443. The decisions of the Proprietors to refuse service to Petitioners, whether or not discrimnatory, were made in the ordinary conduct of their businesses and constitute, as heretofore shown, lawful exercise of their property rights in connection with these businesses.

That the protection of such property rights was one of the basic purposes of the Fourteenth Amendment has frequently been recognized by this Court, as has the obvious fact that such protection must necessarily preserve the lawful enjoyment of such rights.

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. *Shelley v. Kraemer*, 334 U. S. 1, 10.
>
> Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U. S. 366. Property consists of the free use, enjoyment and the disposal of a person's acquisitions without control or diminution save by the law of the land. *Buchanan v. Warley*, 245 U. S. 60, 74.

Of course, such protection of lawful property rights must be just that. To remove that protection, whether in the form of police power or judicial remedial rights is, in effect, to deprive the owner of the property itself. This is precisely what Petitioners request of this Court.

While Petitioners do not question the City's use of its police powers to eject white trespassers on the Proprietors' property, they would deny its use to protect the property from Negro trespassers. In short, *because* of the customer's race, the Proprietor loses his right to police protection and thus the enjoyment of his property, even though, as heretofore shown, the decision to exclude that customer was itself lawful.[7] Is this not a deprivation of the Proprietors' property for the benefit of the trespassers solely because of the trespassess' race? Such is exactly what the Fourteenth Amnedment prohibits.

> Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection, unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class. *Truax v. Corrigan*, supra, page 333.

See also *Shelley v. Kraemer, supra; Buchanan v. Warley, supra; Barrows v. Jackson*, 346 U. S. 249; *Liggett Co. v. Baldridge*, 278 U. S. 105; *Ochoa v. Morales*, 230 U. S. 139; *Barbier v. Connolly, supra.*

Petitioners would justify this result on the theory that the Proprietors' decisions, even though lawful, are discriminatory and that their enforcement under the police powers constitutes prohibited "state action," within the meaning of *Shelley v. Kraemer, supra.* However, the distinction is clear. In *Shelley*, the discriminatory decision was actually made in part by the state. The state was faced with

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[7] Presumably, the Proprietors would still be free to refuse service or employ "self help" to eject the trespasser. Can this possibly be deemed adequate protection from the economic effect on the Proprietor's business of the presence of unwanted customers on other customers? In any event, it is inconceivable that while one may use "self help" to enforce his rights, he may not call upon a peace officer for the same purpose. See *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960).

two choices—whether to deprive a Negro of his property, lawfully acquired, solely because of his color by enforcing a private covenant, or whether to protect the lawful property rights of the Negro at the expense of refusing to enforce the contractual rights of his neighbors. In choosing to sustain the former value, the state actually participated in the decision to discriminate.

The Court carefully pointed up this distinction:

> The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing. *Shelley v. Kraemer*, supra, p. 19.

Here, however, there has been absolutely no participation by the City of any discriminatory decision. The lawful decisions to refuse Petitioners service and the requests that they leave the premises, even though based on racial consideration, were solely those of the Proprietors, in which the City played no part. When Petitioners refused to leave, only then did they become trespassers and only then did the City enter the picture. As trespassers, Petitioners were subject to police action, regardless of their color, and the City's enforcement of the trespass law in no way involved discriminatory conduct or decisions on its part. The sole effect of the City's conduct was to obviate the Proprietors' rights to use "self help" in protecting their property which could have resulted in violence. In short, the "state action" involved here is limited to the non-discriminatory exercise of police powers to avoid violence and has no connection with the lawful, if discriminatory, private

decisions of the Proprietors to request Petitioners to leave their premises.[8]

Apparently, Petitioners recognize that these cases involve no discriminatory conduct on the part of the state prohibited by the Fourteenth Amendment. For this reason, they would abandon the entire concept of "state action", as it now exists and would impose upon the states, under the Fourteenth Amendment, the affirmative duty to prevent all forms of "public" discrimination, especially those which involve what Petitioners term the "narrow" or "technical" property rights of others. (Pet. Br. p. 33-48.)[9] However, beginning with its first interpretation of the Fourteenth Amendment in the *Slaughterhouse Cases*, 16 Wall 36, this Court has consistently held that the Amendment created no new rights among the private citizens of the state as to each other, but was designed solely to prevent actual discrimination by the states themselves.[10]

Nor is this Court faced here with the assertion by Petitioners of any established constitutional right which the states are required to protect, such as that raised in *Marsh v. Alabama*, 326 U. S. 501. We know of no constitutional

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[8] This Court must have recognized this obvious distinction from the Shelley decision. In none of its recent decisions involving a private establishment has the Court concluded that the mere enforcement of the criminal law, without more, constituted prohibited "state action." See *Boynton v. Virginia*, 364 U. S 454; *Shuttlesworth v. Birmingham*, 373 U. S. 262; *Avent v. North Carolina*, 373 U. S. 375; *Thompson v. Louisville*, 362 U. S. 199; *Garner v. Louisiana*, 368 U. S. 157; *Peterson v. Greenville, supra; Lombard v. Louisiana, supra.*

Likewise, the Attorney General of the United States recognized this difference in his testimony regarding the pending "Public Accommodations Bill":

> I would point out to you the Fourteenth Amendment says there has to be action by the State . . .
>
> * * * * *
>
> . . . You have to have action by the State under the Fourteenth Amendment. It is not just individual action. It has to be action by the State You can make an argument, for example, that all the State did was give a business a liquor license. They didn't tell them that they should go ahead and discriminate. The argument would be that it was not action by the State to permit them to discriminate.
>
> Testimony of Robert F. Kennedy, Hearings Before the Committee on Commerce, United States Senate, Eighty-Eighth Congress, First Session on S. 1732, Part 1, page 74, July 1, 1963.

[9] It is noteworthy that these are the same "narrow" or "technical" rights protected by this Court in *Shelley*.

[10] See footnote 2.

right to be free of "inconvenience" or "humiliation," especially where one enters the private business of another against the owner's known wishes for the purpose of protesting the manner in which that business is run.[11] Neither is there any constitutional prohibition of discrimination, on any basis, among private individuals, whether such discrimination occurs in public or in the privacy of one's living room.[12]

Unquestionably, the state has the right to abolish the private discrimination of which Petitioners complain. As they indicate, this has been accomplished in many states, (Pet. Br. p. 37-38) but always by the use of the ballot and the legislative process. If indeed there is a "felt need and apprehension" (Pet. Br. p. 58) on the part of Petitioners for relief, their remedy lies in their participation in the elective and legislative processes of the state governments, not in a distortion of the United States Constitution which has the sole effect of placing the federal government, through its courts and Acts of Congress, in the business of regulating all the relationships and aspects of the private individuals to each other. In the apt language of this Court:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of a cause, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected. *Civil Rights Cases, supra*, p. 25.

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[11] Petitioners testified they had frequented the establishment involved and they must therefore have known of the Proprietors' policies against serving Negroes at the lunch counter. See Barr 25, 34, 30; Bouie 27, 43. In fact, the obvious purpose of their presence was to protest this policy.

[12] See footnote 2.

Petitioner apparently would permit racial discrimination in the living room. (Pet. Br. p. 56) But where is the basis for such a distinction? The public "private" business property supports the living room. The latter cannot exist without the former. Is one a more "narrow" or "technical" property interest than the other?

Clearly, this record presents no case of unconstitutional conduct on the part of the City.

c. *The convictions in Barr v. City of Columbia involve no circumstances of official coercion.*

Petitioners seek to isolate special circumstances in *Barr v. City of Columbia* (No. 9) to justify a finding of "state action" on the part of the arresting officers. They suggest that the proprietor's decision was, in effect, coerced by the police. The record will not support such a contention.

The Proprietor testified:

> Page 17. Q. Had you informed Mr. Stokes [the arresting officer] prior to the defendants coming in, that you were not going to serve them, and that you wanted them to leave?
>
> A. That's correct. I was informed on Monday that they would be there at 12:35 Tuesday, under their plans, etc.
>
> Page 20-21 . . . I was informed on Monday, that a demonstration was planned for the Taylor Street Pharmacy at 12:35. Didn't say what date.
>
> Q. Based upon your information you then asked the assistance of the Police Department and other officers?
>
> A. That's correct.
>
> Q. And the police officers who were in your store on March 15, 1960, were there at your request?
>
> A. Well, I would say yes or no. I mean they came and informed me of the demonstration and we were working as a group. I'll put it that way. I didn't call them to come around and inform me. They informed me in advance.
>
> Q. When you say working together, you requested their assistance in preventing this demonstration?
>
> A. Not necessarily a demonstration. Any type of violence could erupt or anything, against my store policy. It could create violence.

Q. Anything against your store policy, you then wished the officers to assist you in preventing?

A. That's correct.

Q. So you then requested their assistance?

A. I would put it that way, yes. I wanted them there. Let's put it that way.

Page 23. Q. You told them to move and they refused, did you ask them then to arrest them?

A. We had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing.

Q. You had already agreed with the Police Department—

A. If we had a demonstration, if we requested them to leave and they refused, then they would be arrested.

Q. So in fact you had instructed the Police Department to arrest them if they refused to leave at your request?

A. Not necessarily, I had instructed them but that was an agreement pertaining to the law enforcement division.

Q. You let the Police Department know that that was your wish?

A. That I would not serve them.

Q. And if they did not leave when you asked them, you wanted them arrested?

A. That's correct.

Clearly, the decision not to serve Petitioners and to request their departure was purely that of the Proprietor.[13]

Nor is the situation altered by the fact that the Proprietors requested the presence of the officers in advance of the demonstration. Having been alerted of the exact time of the demonstration (Barr R. 17, 20-21), it was perfectly reasonable and proper for the Proprietor to have police help

[13] This testimony was corroborated by the police officer who was present:

Page 9. A. . . . Before they came in, the manager or the owner, Mr. Terry, had told me that he wasn't going to serve them and that he wanted them out of his store, if they came back.

on hand at the time of the demonstrator's arrival, rather than await their actual presence before calling for police protection.

Neither is there any evidence of the police officers counseling the Proprietor to secure evidence of a crime. Before the police intervened in any way, the Proprietor first, on his own, instructed Petitioners to leave. (Barr R. 3-4, 12-14, 17). Only after Petitioners refused his request did the officers intervene to ask the Proprietor to instruct each individual again to make sure that each had heard the request. (R. 4).

The arresting officer testified:

Pages 14-15. Q. State your reason for doing so?

A. Why I asked them to leave?

Q. Yes?

A. As I stated before, he had informed me that he wasn't going to serve them and that he wanted them out of his store. All right, after he had made the statement to all of them, they sat there like maybe they didn't hear him. The others had started to get up, the white customers stood up, and the reason I asked to tell them again so that they would know that he wasn't going to serve them and wanted them to leave.

Q. In fact, you were assisting him in refusing them service in asking them to leave?

A. I wouldn't say I was assisting him.

Q. What was your point in being certain that they heard him?

A. So that whenever they didn't leave and they had been asked to leave, well I heard him ask them to leave and they ignored him. He's the owner of the store and as I said, my purpose was there to prevent violence, but at that particular point they refused to leave and it seemed to me another law was being broken.

Q. What was that law?

A. They were trespassing.

Q. Are you familiar with the trespass law?

A. No, I don't say I'm all familiar with it.

Q. It was an ever present factor in your mind that day?

A. I wouldn't say it was ever present. I tried to keep all the laws. I don't say all of them, but I tried to keep most of them in my mind.

Q. You did however, assist the manager in refusing service to these defendants, didn't you?

A. I won't say I assisted him in refusing service.

The officer's request for a repetition of the instructions was clearly for Petitioners' own benefit—to afford them every opportunity to avoid being arrested solely because of a failure to hear the Proprietor's instructions. Only after the Petitioners had obviously heard the request to leave and still deliberately refused to depart did the officers act. Clearly, this record reflects no circumstances comparable to those found in *Lombard v. Louisiana, supra*, and *Peterson v. Greenville, supra*.

II

THE SOUTH CAROLINA SUPREME COURT HAS NOT CONSIDERED OR PASSED UPON THE APPLICATION OF THE DUE PROCESS CLAUSE TO THE STATUTES INVOLVED

The Petitioners and the United States as Amicus Curiae take the position that the statutes underlying the convictions of Petitioners are unconstitutionally vague as applied to Petitioners in this action in that the wording of the statutes and their interpretation by the courts of South Carolina gave no notice to the Petitioners that their acts in these cases were in violation of the statutes, thereby depriving them of rights guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States. This position is without merit.

a. *This Court, in reviewing a decision of the South Carolina Supreme Court, has no jurisdiction to consider questions not raised or passed upon by that Court.*

In the record of these cases the question of the constitutionality of the Trespass Statute, Section 16-386, Code of Laws, South Carolina, 1952, is first raised in the Petition for Writ of Certiorari. The question was not presented to the South Carolina Supreme Court and was not decided by that Court.

Rule 8, Section 2, of the Rules of the Supreme Court of South Carolina states:[14]

> The Brief of Appellant shall be preceded by a statement of the questions involved.
>
> . . . Ordinarily, no point will be considered which is not set forth in the statement of the questions involved or suggested thereby.

In the *Barr* case, the pertinent statement was as follows (Appendix I-A):

QUESTIONS INVOLVED

> I. Did the court err in refusing to hold that under the circumstances of this case, the arrest and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4)
>
> A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?
>
> B. Were the appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?"

In the *Bouie* case, the pertinent statement was as follows (Appendix 13A):

QUESTIONS INVOLVED

> Did the court err in refusing to hold that under the circumstances of this case the arrest and convictions of appellants were in furtherance of a custom of racial

[14] This Court has a rule to the same effect. Supreme Court Rule 10, paragraph 2.

segregation, in violation of the Fourteenth Amendment of the United States Constitution? (Exceptions 3 and 4)

A. Did the conviction of appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Constitution?

B. Did the application of appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionally protected right of freedom of expression?

No question is raised as to the vagueness of the statutes by either of the above statements, nor is any such question argued or pressed by the briefs of the Petitioners (appellants below) which are printed as an appendix hereto.

The South Carolina Supreme Court has consistently held that questions which are not argued in printed briefs will not be considered even though the questions have been initially raised by exceptions.

In *Priester v. Priester*, 131 S. C. 284, 127 S.E. 18, the Court said:

> No exceptions in the matter of the appeal from the order of the Circuit Judge settling the case for appeal were argued in appellant's printed briefs. Any assignment of error in that regard must, therefore, be deemed abandoned.

In *Echols v. Seaboard Air Line Railway Co.*, 174 S. C. 537, 178 S.E. 139, the Court said:

> This is the only question which appellant has argued in his printed brief. Therefore, under the rules and decisions of this Court, all other exceptions are deemed abandoned. Supreme Court Rule 8, Secs. 2 and 4. *Priester v. Priester*, 131 S. C. 284, 127 S.E. 18.

See also *Hucks v. Sellers*, 236 S. C. 239, 113 S.E. (2d) 753 and *Seegars v. WIS-TV*, 236 S. C. 355, 114 S.E. (2d) 502.

In the cases here being reviewed, the question of the constitutionality of the statutes had not even been raised

by the exceptions to the order of the Richland County Court. (Barr R. 51-52) (Bouie R. 63)

Having established that this question was not considered or passed upon by the South Carolina Supreme Court, it necessarily follows that this Court cannot now consider it in reviewing the decision of that Court.

In *Hulbert v. Chicago*, 202 U. S. 275, this Court in reviewing a decision of the Illinois Supreme Court, said:

> According to the practice of the court, an error not assigned is not open to review. *Berry v. Chicago*, 192 Ill. 154, 155, 61 N.E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keys v. Kimmel*, 186 Ill. 109, 114, 57 N.E. 851. And such rule of practice will be recognized by this court. *Erie R. Co. v. Purdy*, 185 U.S. 148, 153. It follows that this court has not Jurisdiction of this writ of error. [Citing cases.]

In *McGoldrick v. Compagnie General Transatlantique*, 309 U. S. 430, the Court said:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, *and then only in cases coming from the Federal Courts*, that it consider questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225; *Duignan v. United States*, 274 U. S. 195, 200. [Emphasis added.]

and further:

> In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge

before them, or which, in the course of proceedings there, have been abandoned.

In *Edelman v. California*, 344 U. S. 357, Mr. Justice Clark, speaking for the Court, said:

> It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U. S. 275; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308.

Mr. Justice Stone speaking for the court in *Yakus v. United States*, 321 U. S. 414, 444, said:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U. S. 323, 331; *Barbour v. Georgia*, 249 U. S. 454, 460; *Whitney v. California*, 274, U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California, supra* (274 U. S. 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U. S. 1, 81 L. Ed. 3, 57 S. Ct. 2, with *Ex parte Siebold*, 100 U. S. 371.

See also *Musser v. Utah*, 333 U. S. 95, *Dorrance v. Pennsylvania*, 287 U. S. 660; *John v. Paullin*, 231 U. S. 583, 585, and *Central Union Tel. v. Edwardsville*, 269 U. S. 190.

The conclusion is inescapable that in these cases, here before this Court on Writ of Certiorari to the Supreme Court of South Carolina, the constitutionality of the statutes involved is not in question.

b. *Whether or not the acts of Petitioners brought them within the prohibitions of the statutes under which they were charged was not raised or briefed to the South Carolina Supreme Court and was not decided by that Court.*

The position that the Trespass and Breach of Peace Statutes are void for vagueness requires as its basis a determination that the South Carolina Supreme Court in its decisions in these cases has interpreted the statutes to apply to the acts of the Petitioners and that as so interpreted the statutes do not conform to the due process requirements of the Fourteenth Amendment.

A brief review of these records will show that this very question was deliberately abandoned by Petitioners, apparently in order to prevent a decision on this question favorable to them and to preserve the "state action" question for review by this court on facts which Petitioners considered to be outstandingly favorable to their position.

In the *Barr* case, the Petitioners were found guilty of trespass and breach of peace (Barr R. 42). In the Bouie case, the Petitioners were found guilty of trespass and Bouie himself was found guilty of resisting arrest (Bouie R. 51). The record does not contain the exceptions upon which the appeal to the Richland County Court was based and the arguments there were oral and not reported, but it is evident from the opinion of Judge Crews (Barr R. 46-51) (Bouie R. 57-62) who combined the cases and issued one opinion, that the question of whether or not the acts of the Petitioners constituted violations of the trespass statute, the breach of peace statute, and, in the case of Bouie individual-

ly, resisting arrest, were raised and argued before him and he decided adversely to the Petitioners on each count.

This question was not preserved by the very general (1 and 2) exceptions to Judge Crews' order in the Barr case, and it was abandoned entirely by Petitioners failure to argue the point in their brief and by their failure to sufficiently specify the error complained of both in their exceptions and in their statement of "Questions Involved." (Appendix 1A-13A). Upon the appeal the South Carolina Supreme Court said: (Barr R. 55-56)

> We think that Question II is based on exceptions too general to be considered. They are as follows:
>
> '1. The Court erred in refusing to hold that the City failed to prove a prima facie case.
>
> '2. The Court erred in refusing to hold that the City failed to establish the corpus delicti.'
>
> "The foregoing exceptions do not comply with rule 4, Section 6 of this Court. They do not point out in what respect the City failed to make out a prima facie case or to establish the corpus delicti. We do not know to which of the two offenses involved these exceptions are directed. We are not aided by appellants' brief. Only scant reference is there made to these two exceptions and apparently the position is taken that their determination is dependent upon the disposition of the other questions which we have held to be without merit.
>
> It has been held that an exception to the effect that the judgment is contrary to the law and the evidence is too general to be considered. *State v. Turner*, 18 S.C. 103; *State v. Cokley*, 83 S. C. 197, 65 S.E. 174; *State v. Davis*, 121 S. C. 350, 113 S.E. 491. The same conclusion has been reached with reference to an exception 'that plaintiff failed to make out a case against defendant.' *Concrete Mix, Inc. v. James*, 231 S. C. 416, 98 S.E. (2d) 841. Other pertinent cases are reviewed in *Hewitt v. Reserve Life Insurance Co.*, 235 S. C. 201, 110 S.E. (2d) 852. It was pointed out in *Brady v. Brady*, 222 S. C. 242, 72 S.E. (2d) 193, that 'every

> ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to "grope in the dark" to ascertain the precise point at issue.'

In the *Bouie* case, the same situation existed as to the trespass statute, but the Petitioner Bouie did argue the failure to prove the charge of resisting arrest and the South Carolina Supreme Court reversed the Richland County Court on that charge. The South Carolina Supreme Court, in the *Bouie* decision, did say that the Petitioners were guilty of trespass but, since that question was not before them, that statement was dictum.

It is important to the understanding of these cases to realize that the South Carolina Supreme Court, in deciding *Barr* and *Bouie*, relied heavily on its recent decision in *City of Greenville v. Peterson*. The Greenville case arose under an amendment to the trespass statute which was adopted by the South Carolina General Assembly *after* the *Barr and Bouie* convictions. This fact was not called to the attention of the South Carolina Supreme Court by the Petitioners.

Under our system of jurisprudence, state courts have the final word as to interpretation of state laws. This Court has the final word as to the conformity of state laws, as interpreted by state courts, to the United States Constitution.

This well established doctrine is stated in *Musser v. Utah*, 333 U. S. 95:

> This trial was not conducted in federal court nor for violation of federal law. It is a prosecution by the State, in its courts, to vindicate its own laws. Our sole concern with it is to see that no conviction contrary to a valid objection raised under the Fourteenth Amendment is upheld. What the statutes of a state mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final

word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. In order that the controversy may be restored to the control of the Supreme Court of Utah, its present judgment is vacated and the cause is remanded for proceedings not inconsistent herewith.

In the *Barr* and *Bouie* cases, the Petitioners, by raising the question of interpretation in the Richland County Court, abandoning the question before the South Carolina Supreme Court and then raising it as a constitutional question before this Court, have attempted to oust the state courts from their jurisdiction to interpret the statutes under which Barr and Bouie were convicted.

From the record, it cannot be said that the South Carolina Supreme Court has, upon proper presentation and proper briefing, held that the acts of the Petitioners are clearly within the prohibitions of the statutes involved and therefore it cannot be said that the statutes are, as interpreted by the South Carolina Supreme Court in their application to these Petitioners, void because of vagueness.

III

THE RECORDS BEFORE THE SOUTH CAROLINA SUPREME COURT SUPPORT PETITIONERS' CONVICTIONS

a. *Trespass.*

The Petitioners deliberately remained on the premises, after being told to leave, with the intent to commit an act which would lead to their arrest.

Throughout these proceedings the Petitioners have attempted to appear in two roles. In one they appear as naive college students who merely stopped in at a lunch counter in a drugstore to buy some food with no knowledge that there existed a policy or custom not to serve members of their race.[15] In this role, the request to leave and the subsequent arrest upon failure to do so came as a complete surprise. In the other role, they appear as leaders in a battle

for their alleged rights to be free from all discrimination, their presence at the lunch counters is stated as being for the purpose of asserting those rights, and they are likened to Ghandi when he marched to the sea (Pet. Br. 55).[16]

In the former role, their position as to lack of notice under the statutes that they were committing a misdemeanor would, if properly before the Court, be entitled to consideration, but in the latter role it is without merit.

The basis for the requirement of notice is that it gives the actor an opportunity to avoid doing those acts which will bring him into conflict with the terms of the statute. If Petitioners were demonstrators intent upon calling attention to the fact that the stores would not serve lunch to them, willing to risk arrest in the furtherance of their cause and, further, seeking to bring the matter into court in the belief that their cause would be vindicated, then the statement to them that they will not be served and that the proprietor wishes them to leave is adequate forewarning to them that their continued presence will subject them to arrest for trespass. At the time Petitioners were asked to leave, they were forewarned and their election was clear. Either to leave promptly or to stay and be arrested for trespass. As demonstrators, they elected to remain and be arrested. Having made this election with full intent, they cannot now complain that they had no opportunity to avoid conflict with the statutes under which they were convicted.

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[16] Testimony of Richard M. Counts (Barr R. 31)

Q. State to the Court your reason for going there?

A. Well, I invited a Fraternity Brother of mine, Charles Barr, to come and have lunch with me. . . .

A. Well as I said, when we arrived there we saw the newsmen and the policemen on the outside, so we just ignored them completely because we didn't know why they were there. . . .

[16] Testimony of Talmadge J. Neal (Bouie R. 35)

Q. As a matter of fact, wasn't it your intention when you went there, to be arrested?

A. I refuse to answer that, sir.

Q. Why? Wasn't that your intention, to be arrested?

A. I refuse to answer that.

Mr. Jenkins: If your Honor please, I suggest that the Court instruct the witness that he must answer any question put to him by the City Attorney.

The Court: That's exactly right, you will have to answer counsel's questions.

A. Yes.

b. *Breach of the Peace (Barr.)*

Under Section 15-909 of the 1952 Code of Laws of South Carolina, the South Carolina Supreme Court has defined "breach of the peace" to include:

> . . . A violation of the public order, a disturbance of public tranquility, by any act or conduct inciting to violence . . . It may consist of an act . . . likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful tending, with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense. . . . *State v. Edwards*, 239 S. C. 339, 344, 123 S.E. 2d 247, 249.[17]

Beyond question, Petitioners' conduct falls within this definition.

The Petitioners had previously frequented Proprietor's store. (Barr R. 25, 34) In fact, at least one had theretofore purchased food from the lunch counter to take out. (Barr R. 34) Because of this familiarity with the store itself, Petitioners were bound to have known of its policy against serving Negroes at the counter.[18] In fact, testimony of one of the Petitioners indicates that he expected to be requested to leave. (Barr R. 28-29) They entered the store pursuant to a pre-arranged plan for the *sole* purpose of being served at the lunch counter against the known wishes of the Proprietor. (Barr R. 25, 30)

The City's testimony revealed that such a previous "demonstration" had "stopped everything" in the store. (Barr R. 24) In this instance, several lunch counter patrons jumped up and left their dinner when Petitioners were seated. (Barr R. 4, 11-12, 23-34) The entire store was

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[17] This definition of Breach of the Peace is quite similar to that propounded by this Court. *Cantwell v. Connecticut*, 310 U. S. 296, 308.

[18] Especially must Petitioners have known of this policy if in fact there was such a local "custom" as they insist. (Pet. Br. p. 25-33)

"on pins and needles . . . for fear it could possibly lead to violence." (Barr R. 23-24)

Clearly, Petitioners' insistence in remaining on the premises after ample request to leave, when they knew in advance they were not wanted and would be refused service, and when the obvious result of their refusal was to incite violence, or an act or conduct "likely to produce violence, or inciting to produce violence," and ". . . to break the peace" within the meaning of Section 15-909. Such has been the conclusion of other courts. See e.g., *Feiner v. New York*, 340 U. S. 315; *United States v. Kessler*, 213 F. 2d 53 (3rd Cir. 1952); *State v. Van Allen*, 140 Conn. 586, 102 A. 2d 526; *People v. Phillips*, 284 N. Y. 235, 30 N.E. 2d 488.

Quite a different situation existed in *Garner v. Louisiana*, *supra*, and *Thompson v. Louisville*, *supra*. In the *Garner* decision, the State Court's definition of "breach of the peace" was much narrower than that presented here. (See pages 165-169) More important, however, there was no evidence there that Petitioners had been requested to leave, that they had refused to obey any such request to leave, or that the Petitioners' conduct had disturbed other customers. Similarly, the record in the *Thompson* decision, involving a conviction for "disorderly conduct," is not comparable to that presented here. In that case, Petitioner was welcomed into the store and had been served by the Proprietor, who did not call the police. The only evidence offered by the City was Petitioner's "argumentative" conduct and attitude toward the police.

Clearly, the doctrines of these cases have no application to this record, which amply supports Petitioners' convictions for breach of the peace.

CONCLUSION

For the reasons stated the judgment of the Supreme Court of South Carolina should be affirmed or in the alternative the writ should be dismissed.

Respectfully submitted

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The State of South Carolina

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

HONORABLE JOHN W. CREWS, JUDGE

CITY OF COLUMBIA, Respondent,

against

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE, and JOHNNY CLARK, Appellants.

APPELLANTS' BRIEF

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

QUESTIONS INVOLVED

I. Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State Action within the meaning of the Fourteenth Amendment?

B. Were appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?

II. Did the State fail to establish the *Corpus Delicti* or prove a *prima facie* case? (Exceptions 1, 2.)

STATEMENT

This is an appeal from an Order of Honorable John W. Crews, Associate Judge, Richland County Court, dated April 28, 1961, affirming convictions of the Appellants in the Recorder's Court of the City of Columbia.

Appellants were charged with the violation of Section 16-386 (Trespass) and Section 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended. The charges arose out of efforts on the part of Appellants to obtain lunch counter services in the Taylor Street Pharmacy, located in Columbia, on the 15th day of March, 1960.

Trial by jury was waived, and Appellants were tried before Columbia Recorder John I. Rice on the 30th day of March, 1960. Appellants were found "guilty as charged, and they will be fined the sum of $100.00 on each charge, of which amount the sum of $24.50 will be suspended on each charge."

Thereafter, by consent, the appeal from this trial was consolidated with a similar appeal from the Columbia Recorder's Court and argued before Honorable John W. Crews, Associate Judge, Richland County Court. In the Order from which this appeal is taken, the judgment of the Recorder's Court was affirmed. Due and timely notice of appeal from this Order was given.

Appeal from Richland County

ARGUMENT

Question I

Did the Court err in refusing to hold that under the circumstances of this case, the arrests and convictions of Appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3, 4.)

A. Was the enforcement of segregation in this case by State action within the meaning of the Fourteenth Amendment?

1. The evidence presented is to the effect that Taylor Street Pharmacy is a large store which sells numerous items to the public (Tr. p. 22, ff. 86-87). It invites all members of the public onto its premises to do business and serves alike all persons who respond to the invitation to do business courteously and without regard to race (Tr. p. 23, f. 87) except at its lunch counter, which is operated for white persons only (Tr. p. 24, f. 94.)

When these appellants entered the lunch counter area of the store, they took seats and shortly thereafter they were requested to leave (Tr. p. 21, f. 81). Even a casual perusal of the record will demonstrate the extent to which the police of the City of Columbia and of the State of South Carolina were inextricably intertwined in the plan and scheme which ended in the arrests and convictions of appellants.

Indeed, the police informed the store manager that Negroes would enter his business (Tr. p. 26, f. 101). Thereafter, store manager and police agreed in advance of the arrival of appellants that they would be arrested (Tr. pp. 28-29, f. 112, *et seq.*):

"Q. You told them to move and they refused, did you ask them to arrest them?

A. We had a previous agreement to that effect, that if they did not leave, they would be placed under arrest for trespassing."

Again, Mr. Terry, the store manager, concluded his testimony as follows (Tr. p. 30, f. 118):

"Q. Was it your idea to have these defendants arrested, or was it the idea of the police department?

A. I'll put it that it was the both of us' idea, that if they were requested to leave and failed to leave, and given time to leave, that they would be arrested."

An agent of the South Carolina Law Enforcement Division testified (Tr. p. 4, f. 14):

"Q. What happened then?

A. I requested that Mr. Terry go to each individual and ask him to leave, in my presence, and he went to each one and asked him to leave, that he wasn't going to serve them. * * *"

And again (Tr. p. 5, ff. 18-19):

Q. "What did you do then?

A. Well, I gave them, I couldn't say exactly how long, but several minutes, after Mr. Terry had left the section, to see what they were going to do and they just sat there. * * * I walked in the middle of those and told them, I believe the words I used, that I was a State Officer and they had been asked to leave and they didn't so they were under arrest. That's when they got up and followed us out."

It is respectfully submitted that the evidence presented in this matter shows conclusively that by ar-

resting the appellants, the officers of the City of Columbia were aiding and assisting the management of Taylor Street Pharmacy in maintaining its policy and, indeed, the policy of the City of Columbia and of the State of South Carolina, of racial segregation. Therefore, the arrests and conviction of appellants under the circumstances shown herein contravene the Fourteenth Amendments interdiction against State enforced racial segregation. 17

Beyond all doubt, the City of Columbia cannot make it a crime for a Negro to seek service at a lunch counter reserved by custom for white persons or for white persons and Negroes to be served at such counter at the same time, for such a law is a state law commanding segregation. *Gayle v. Browder*, 352 U. S. 903, 1 L. Ed. (2d) 114, 77 S. Ct. 145; *Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752, appeal dismissed, 351 U. S. 901, 100 L. Ed. 1439, 76 S. Ct. 692; *Holmes v. City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141. It is respectfully submitted that here, the City has attempted to do the same thing under the guise of naming the offense "trespass after warning." Their arrests and convictions were based upon race only and are therefore incompatible with the Fourteenth Amendment to the United States Constitution. 18 19

The application of a general, nondiscriminatory and otherwise valid law to effectuate a racially discriminatory policy of private business or agency, and the enforcement of such a discriminatory policy by State governmental organs, has been held repeatedly to be a denial by State Action of rights secured by the Fourteenth Amendment. Thus, in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, the judicial injunction was held violative of the Fourteenth Amendment. And, in *Barrows v. Jackson*, 346 U. S. 249, it 20

was held that such covenants could not be enforced, consistent with the Fourteeth Amendment, by the assessment of damages for their breach. In *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276, the Supreme Court held that the criminal courts could
21 not be used to convict of trespass persons exercising their rights of free speech in a privately owned company town.

The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877, 100 L. Ed. 774, 76 S. Ct. 133, affirming, 220 F. (2d) 386) golf courses; (*Holmes v.*
22 *City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141, reversing, 223 F. (2d) 93) park and recreational facilities; (*New Orleans City Park Improvement Asso. v. Detiege*, 358 U. S. 54, 3 L. Ed. (2d) 46, 79 S. Ct. 228, affirming, 252 F. (2d) 122) and theaters; (*Muir v. Louisville Park Theatrical Ass'n.* 347 U. S. 971, 98 L. Ed. 1112, 74 S. Ct. 783, reversing, 202 F. (2d) 275, and remanding for consideration in light of *Brown v. Board of Education*, 347 U. S. 483, and "conditions that now prevail").

23 A restaurant, like a theater, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. Federal Courts have held, therefore, that rights guaranteed by the equal protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Darrington v. Plummer*, 240 F. (2d) 922, certiorari denied, 353 U. S. 924.

When the state enforces or supports racial discrimi-
24 nation in a place open for the use of the general public, it infringes Fourteenth Amendment rights not-

withstanding the private origin of the discriminatory conduct. *Muir v. Louisville Park Theatrical Ass'n, supra.*

Nor, we submit, is it relevant that the property upon which discrimination occurs is privately owned. State laws which require or permit segregation of the races on privately owned intrastate motor buses are invalid under the Fourteenth Amendment. *Gayle v. Browder*, 352 U. S. 903, 1 L. Ed. (2d) 114, 77 S. Ct. 145; *Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752, appeal dismissed, 351 U. S. 901, 100 L. Ed. 1439, 76 S. Ct. 692. Racial discrimination by a privately owned place of public accommodation may also violate Fourteenth Amendment rights if such place is financially supported or regulated by the State, *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212, certiorari denied, 326 U. S. 721.

2. It is recognized that a formally "private" pattern of segregation is in the background of this case. However, no right of private property was distinctly asserted or claimed, and the connection between the "private" pattern and the independent police and judicial action remains vague.

It is respectfully submitted that any "private" pattern of segregation found in this case was infected with state power. The enforcement of obedience to the custom of segregation was the work throughout of the formal agencies of the state.

Appellants were not only "invited" but welcomed as cash customers everywhere on the premises of Taylor Street Pharmacy except at its lunch counter. (Tr. p. 23, ff. 90-91). The "property" right at stake was simply the right to segregate. Taylor Street Pharmacy and similar stores are a part of the public life of Columbia. The subjection of their policies to constitu-

tional control raises no real issues of individual privacy or freedom of association. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276.

29 The intervention of police support of the segregation pattern, and the invocation of the criminal prosecution machinery, are the immediate and obvious State involvements. "Whether the statute-book of the State actually laid down any such rule * * *, the State, through its officers, enforced such a rule; * * *" *Civil Rights Cases, supra*, 109 U. S. at 15.

But the deeper involvement of the State in this matter arises from two facts: (1) The proprietor of Tay-
30 lor Street Pharmacy like other stores in Columbia, was not acting on whim, or in obedience to personal taste as to association, but was following a custom that characterizes South Carolina as a community; (2) the maintenance of this custom, by law and other official action, is the policy of South Carolina as a political body.

The intervention of the police in this case was obviously based on their knowledge of the customary character of this segregation. There is not a scintilla
31 of evidence to rebut the inference that the segregation practiced by the Proprietor was a direct consequence, and indeed a part, of the South Carolina custom of public segregation of the race.*

The formally "private" segregation practiced as related in this case is therefore unbreakably connected with State law, for it is the creature of State custom. This course of action is not only touched by but permeated with the power of the State.

32

* It would serve no useful purpose to enumerate the statutes now in force which require racial segregation in South Carolina.

It is submitted that the quantum and kind of genuine "private" choice in this pattern is negligible, a mere bridge from statewide custom, fostered by State law and policy, into the State criminal machinery. It is submitted that "state action" permeates the entire pattern shown by this record.

B. *Were Appellants unwarrantedly penalized for exercising their freedom of expression in violation of the Fourteenth Amendment?*

Appellants in peacefully taking seats at the "white" counters were solemnly expressing their belief that they were morally entitled to be treated on terms of full quality by the establishments that solicited and enjoyed their patronage at other counters. Such a nonverbal expression on a matter of solemn moment is in every way equivalent to speech and is entitled to constitutional protection. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88. It is entirely immaterial at this point whether they had a legal or constitutional right to enjoy unsegregated service; what is at issue here is something quite different, their right to indicate their conviction that in fairness they should be served.

Nor is there any problem of the accommodation between private property rights and the right of free expression, of. *March v. Alabama*, *supra*, for these appellants were convicted, though in name of trespass, in substance for being in a place reserved by custom for whites.

This case, then, constitutes state suppression of expression of appellants' dissatisfaction with the custom of racial segregation, with no valid state interest appearing.

Question II

Did the State fail to establish the corpus delicti or prove a prima facie case? (Exceptions 1, 2.)

It is felt that the observations made in reference to Question I above obviate the necessity for extensive argument here.

Appellants submit that the purpose behind their arrests and convictions as shown by the record and as heretofore treated in Question I must be considered as determinative of whether they actually committed any crime.

Appellants submit that the *corpus delicti* was not established.

CONCLUSION

For the reasons herein stated, the judgment of the County Court of Richland County affirming the judgment of the Columbia Recorder's Court should be reversed.

Respectfully submitted,

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

11-A

The State of South Carolina

IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY

HONORABLE JOHN W. CREWS, JUDGE

CITY OF COLUMBIA, Respondent,

against

SIMON BOUIE and TALMADGE J. NEAL,
Appellants

APPELLANTS' BRIEF

JENKINS & PERRY,
Columbia, S. C.
Attorneys for Appellants.

QUESTIONS INVOLVED

Question I

Did the Court err in refusing to hold that under the circumstances of this case the arrests and convictions of appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3 and 4.)

A. Did the conviction of appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Constitution?

B. Did the application to appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionally protected right of freedom of expression?

Question II

Did the Court err in refusing to hold that the City failed to prove a *prima facie* case and failed to establish the *corpus delicti*? (Exceptions 1 and 2.)

STATEMENT

This is an appeal from an Order of Honorable John W. Crews, Associate Judge, Richland County Court, dated April 28, 1961, affirming convictions of the Appellants in the Recorder's Court of the City of Columbia.

Appellants were charged with the violation of Section 16-386 (Trespass) and Section 15-909 (Breach of Peace) of the Code of Laws of South Carolina, 1952, as amended. In addition, Appellant Bouie was charged with Resisting Arrest. The charges arose out of the efforts of the Appellants to obtain lunch counter service in the store of Eckerd's Drugs, Incorporated, in Columbia, on the 14th day of March, 1960.

Trial by Jury was waived and Appellants were tried before Columbia Recorder John I. Rice on the 25th day of March, 1960. Appellants were found guilty of the charge of trespass and sentenced to pay fines of One Hundred ($100.00) Dollars or serve terms of thirty days, provided, however, that Twenty-four and 50/100 ($24.50) Dollars of each fine was suspended. Appellant Bouie was, also, found guilty of resisting arrest and received a sentence of payment of a fine of One Hundred ($100.00) Dollars or service of thirty days.[1]

Thereafter, by consent, the appeal from this trial was consolidated with a similar appeal from the Columbia Recorder's Court and was argued before the Richland County Court, Honorable John W. Crews, Associate County Judge, presiding. In the Order from

[1] Although it is not shown in the Transcript of Record of trial proceedings, the Recorder stated that he considered that the charge of trespass embodied the charge of breach of the peace and, hence, found defendants guilty only of trespass.

which this appeal is taken, the judgment of the Recorder's Court was affirmed. Due and timely notice of appeal from this Order was given.

ARGUMENT

Question I

Did the Court err in refusing to hold that under the circumstances of this case the arrests and convictions of Appellants were in furtherance of a custom of racial segregation, in violation of the Fourteenth Amendment to the United States Constitution? (Exceptions 3 and 4.)

A. *Did the conviction of Appellants of the charge of trespass constitute State action within the meaning of the Fourteenth Amendment to the United States Consitution?*

Testimony presented in this case is to the effect that Eckerd Drugs, Incorporated, is a large drug department store, the Columbia, South Carolina store being part of a chain that operates throughout the southern states (Tr. p. 19, ff. 75-77; Tr. p. 29, ff. 114-115). The store herein concerned invites the public generally onto its premises to do business, and serves all who respond to the invitation on an equal basis without regard to race or color at all departments of the store, except at the lunch department, at which Negroes are denied service (Tr. p. 30, f. 117). Here Negroes are excluded according to custom and practice of stores in the local area, according to the testimony of the store manager (Tr. p. 31, ff. 123-124).

As appellants approached the lunch counter area and proceeded to take seats, the area was roped off in an attempt to prevent their being seated. (Tr. p. 35, ff.

138-139). Appellants were served no food at the lunch counters, indeed, no one took their orders. Other persons, white, sitting in the same general area were served during the period appellants remained in the lunch area (Tr. p. 37, f. 147).

Shortly after appellants seated themselves in the lunch area, members of the Columbia police department arrived, at the request of the store management (Tr. p. 32, f. 127) and at the request of the store manager appellants were arrested.

With reference to the reason for the arrests, the arresting officer testified (Tr. p. 20-21, ff. 80-81):

> "Q. Chief, isn't it a fact that the only reason you were called in from the Police Department to arrest these two persons, was because they were Negroes who were asking for service in the food department in Eckerd's drug store, and the manager was directing them out because they were Negroes? Isn't that correct?
>
> A. Why certainly, I would think that would be the case."

The same officer had previously testified as follows (Tr. p. 12, f. 145):

> "Q. Before you go that far, Chief, why did you ask them to move?
>
> A. Because the manager, in my presence, had asked them to move, and it is my opinion that if he didn't want them in the store and he needed help, that it is my place to get them out."

It is respectfully submitted that appellants were convicted solely of not observing the custom of racial segregation. A change in name cannot make such a conviction less obnoxious to the equal protection clause of the Fourteenth Amendment. In everything but

name, appellants were convicted simply of not following the custom of segregation, and their convictions cannot be sustained without sustaining segregation by the direct force of state law and authority.

It goes without saying that South Carolina cannot make it a crime for a Negro to seek service at a counter reserved by custom for whites, for such a law is simply and solely a state law commanding segregation. *Gayle v. Browder*, 352 U. S. 903; *New Orleans City Park Improvement Assn. v. Detiege*, 358 U. S. 54; *Holmes v. City of Atlanta*, 350 U. S. 879. But that is exactly what the State has done here. South Carolina has made a given action "trespass" and under State law punishes this "trespass". It amounts to the very same thing as a law punishing this same action under a different name. As to appellants, the police and the courts proceeded to arrest and conviction on the clear theory that the mere presence of a Negro at a "white" counter was unlawful in itself. Clearly, this is proscribed State action.

The application of a general, nondiscriminatory and otherwise valid law to effectuate a racially discriminatory policy of private business or agency, and the enforcement of such a discriminatory policy by State governmental organs, has been held repeatedly to be a denial by State action of rights secured by the Fourteenth Amendment. Thus, in *Shelley v. Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, the judicial enforcement of private racially restrictive covenants by injunction was held violative of the Fourteenth Amendment. And, in *Barrows v. Jackson*, 346 U. S. 249, it was held that such covenants could not be enforced, consistent with the Fourteenth Amendment, by the assessment of damages for their breach. In *Marsh v. Alabama*, 326 U. S. 501, 90 L. Ed. 265, 66 S. Ct. 276,

the Supreme Court held that the criminal courts could not be used to convict of trespass persons exercising their rights of free speech in a privately owned company town.

21 The right not to be excluded solely on account of race from facilities open to the public has been held to extend to such accommodations as public beaches and bathhouses (*Mayor and City Council of Baltimore v. Dawson*, 350 U. S. 877, 100 L. Ed. 774, 76 S. Ct. 133, affirming, 220 F. (2d) 386); Golf course (*Holmes v. City of Atlanta*, 350 U. S. 879, 100 L. Ed. 776, 76 S. Ct. 141, reversing, 223 F. (2d) 93); park and recreational facilities (*New Orleans City Park Improvement Asso. v. Detiege, supra;* and theaters (*Muir v. Louisville*
22 *Park Theatrical Ass'n*, 347 U. S. 971, 98 L. Ed. 1112, 74 S. Ct. 783, reversing, 202 F. (2d) 275, and remanding for consideration in light of *Brown v. Board of Education*, 347 U. S. 483, and "conditions that now prevail").

A restaurant, like a theater, a common carrier, a school, a beach, a pool, a park, or a golf course, is a place of public accommodation. Federal Courts have held, therefore, that rights guaranteed by the equal
23 protection clause are contravened when a private lessee of a state-owned restaurant engages in racially discriminatory practices. *Darrington v. Plummer*, 240 F. (2d) 922, certiorari denied, 353 U. S. 924.

When the state enforces or supports racial discrimination in a place open for the use of the general public, it infringes Fourteenth Amendment rights notwithstanding the private origin of the discriminatory conduct. *Muir v. Louisville Park Theatrical Ass'n, supra.*

24 True, a formally "private" pattern of segregation is in the background of this case. However, it is submitted

that these "private" patterns are themselves infected with state power.

To begin, the "property" interest of Eckerd's was an exceedingly narrow one. Management not only "invited" appellants but welcomed them as cash customers on the premises, everywhere except at the lunch counters. The "property" right at stake was simply the right to segregate. Eckerd's a large drug department store, part of an area-wide chain, is a part of the public life of Columbia. The subjection of its policies to constitutional control raises no real issues of individual privacy or freedom of association. *Munn v. Illinois*, 94 U. S. 113; *Marsh v. Alabama, supra.*

State laws which require or permit segregation of the races on privately owned intrastate motor buses are invalid under the 14th Amendment. *Gayle v. Browder, supra; Fleming v. South Carolina Electric & Gas Co.*, 224 F. (2d) 752; appeal dismissed, 351 U.S. 901. Racial discrimination by a privately owned place of public accommodation may also violate 14th Amendment rights if such place is financially supported or regulated by the state, *Kerr v. Enoch Pratt Free Library*, 149 F. (2d) 212.

Justification for invasion of the right to be free from state enforcement of racially discriminatory practices can be supported, if at all, only where the constitutional right is subordinated to a countervailing right or interest so weighty as to occupy a preferred constitutional status. *Cf. Kore-matsu v. United States*, 323 U. S. 214. The narrow issue in the present cases is not whether the right, for example, of a homeowner to choose his guests (as is argued by the City) should prevail over appellants' constitutional right to be free from the state enforcement of a policy of racial discrimination, but rather whether the interests of a pro-

prietor, or management, who has opened up his business property for use by the general public * * * in particular, by persons invited in to trade at numerous departments in drug stores * * * should so prevail.

Courts have long placed restrictions upon proprie-
29 tors whose operations are of a public nature, affecting the community at large. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."
30 *Munn v. Illinois, supra.*

In *Marsh v. Alabama, supra, at* 506, the Supreme Court similarly rejected the contention that the rights of a proprietor of property open to the public were coextensive with those of a homeowner. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ."

31 In *Freemen v. Retail Clerks Local 1207* (Kings County Super. Ct., Washington), decided December 9, 1959 (28 U. S. Law Week 2311), a Washington Court applied the *Marsh case* principle in rejecting the right of an owner of a shopping center to obtain an injunction from a state court restraining peaceful picketing on the privately owned sidewalks of a shopping center, noting that the owner had contracted away his right
32 to private and personal use and occupancy, emphasizing that interference with the owner's fundamental right of privacy was not involved because he had de-

voted his property for use by the general public. In April, 1960, the Superior Court of Raleigh, North Carolina, relying on the *Marsh* decision, dismissed trespass charges against Negroes who had been arrested for demonstrating on the privately owned sidewalks of a shopping center against segregated lunch counters 33
in the stores of the shopping center.

The concepts of "private property" and "state action", as Marsh illustrates, do not fall into neat, precise categories. In the final analysis, the determination whether private conduct has been so "panoplied" by governmental action, power, or support that it may fairly be judged by the standards of the 14th Amendment is, like so many questions of constitutional law, 34
one of proximity and degree. As has been already noted, we are here concerned not with an individual homeowner, but with a large department drug store, a part of a great chain, performing and providing essential public needs. While the facilities here may be distinguished from a company town, such as was involved in *Marsh v. Alabama*, or from the primary voting machinery involved in *Terry v. Adams*, 345 U. S. 461, 473, and *Smith v. Allwright*, 321 U. S. 649, it is submitted that the underlying rationality of those cases is equally applicable here. Eckerd's Drug Store 35
in Columbia, South Carolina, is not comparable to a home, or even to a corner drug store serving a limited clientele. Though privately owned, it is a City and State wide facility operated for the benefit of the public generally, in relation to which the broad constitutional principle of *Marsh v. Alabama* may properly be applied.

In this case, the State of South Carolina is intimately involved in the formally "private" segregation pattern 36
followed by Eckerd's. The intervention of police in

support of the segregation pattern, and the invocation of the criminal prosecution machinery, are the immediate and obvious state involvements. "Whether the statute book of the State actually laid down any such rule . . ., the State, through its officers, enforced such
37 a rule; . . . ." Civil Rights Cases, 109 U. S. 3, at page 15. But the deeper involvement of South Carolina arises from two facts: (1) Eckerd's, in segregating, was not acting on whim, or in obedience to personal taste as to association, but was following a custom that characterizes South Carolina as a community; (2) the maintenance of this custom, by law and other official action, is the policy of South Carolina as a political body.[2]

38 The only rational or imaginable ground for the "private" segregation followed by Eckerd's was obedience to state custom. Though this background fact is assumed rather than explicitly stated in testimony, its presence in the background can be inferred from the records, if such support be thought necessary in regard to a matter of such common knowledge. There is not a scintilla of evidence to rebut the inference that the segregation practiced here was a direct consequence, and indeed a part, of the South Carolina custom of
39 public segregation of the races.

The State of South Carolina as a community was thus indispensably involved in this segregation pattern. But South Carolina as a polity is in the same casual chain of involvement, for the State has given to the segregation custom the full support of state law and policy.

---

[2] It is submitted that the laws, statutes, official pronouncements
40 and policies of the State of South Carolina are so numerous and commonplace that this Court can take judicial notice thereof, and that it is unnecessary to unduly prolong this brief by enumerating same.

The formally "private" segregation practiced in this case is unbreakably connected with state law, for it is a creature of state custom, and the support of that custom is itself the keystone policy of South Carolina as a political entity. This course of action is not only touched by but permeated with the power of the state.

If the element of "private" choice be thought material on this record, appellants insist that the quantum and kind of genuine "private" choice in this pattern is negligible, a mere bridge from statewide custom, fostered by state law and policy, into the state criminal machinery. No private interest of the proprietors of Eckerd's is at stake, other than the gain they may look to from following the state-festered segregation custom.

B. *Did the application to appellants of the trespass statute, under the circumstances of this case, amount to a violation of appellants' constitutionality protected right of freedom of expression?*

There can be no serious doubt that appellants, in peacefully[3] (Tr. p. 9, ff. 33-35; p. 35, ff. 137-139; p. 41, ff. 161-162), taking their places at the "white" counters, were solemnly expressing their belief that they were morally entitled to be treated on terms of full equality by the establishments that solicited and enjoyed their patronage at other counters.[4] (Tr. p. 41, f. 162; p. 55, f. 217). Such a non-verbal expression on a matter of solemn moment is in every way equivalent

[3] It is to be noted that appellants were charged, also, with breach of peace. While the record is silent as to the disposition of this charge, they were found guilty only of trespass (Tr. p. 62-63, ff. 248-249). It is submitted that the record is barren of any evidence of breach of the peace by these appellants.

[4] In the light of the enormous publicity given "sit-in" activities throughout the Nation and State over the past eighteen months, it is submitted that the Court can take judicial notice of the manner of conduct and expressed purpose of participants therein.

to speech and is entitled to constitutional protection. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88. Involved here is their right to indicate their conviction that in fairness they should be served. Their expression was completely peaceful,
45 and was exactly adapted to time and place.

We have here a very clear suppression and penalization of expression, by state authority. No valid state interest appears in this case to overbalance the extremely weighty Fourteenth Amendment interest in personal freedom of expression. The only assertable state interest implemented by these convictions is the interest (abundantly evidenced in the case of South Carolina) in the maintenance of segregation. But this
46 interest can have no constitutional standing, for it takes effect only (as here) as a form of the use of state power to support segregation.

It is submitted that this case constitutes state suppression of expression, with no state interest appearing.

Question II

Did the Court err in refusing to hold that the City failed to prove a prima facie case, and failed to establish the corpus delicti? (Exceptions 1 and 2.)

47 In addition to the charges of trespass and breach of the peace, appellant Bouie was charged with resisting arrest. The testimony is conflicting concerning events that gave rise to the latter charge. It is submitted, however, that taking into consideration all circumstances of this incident, the City has utterly failed to present evidence to support a conviction for resisting arrest.

48 On direct examination the arresting officer testified (Tr. p. 3, ff. 12-14):

"A. . . . that was in my presence, so then I told them both that the manager wanted them out and they should go on out, and this boy on the other side there, Bouie, said, 'For what?' I said, 'Because it's a breach of the peace and I'm telling you the second time to go on out.' He said, 'Well, I asked you for what?' So at that time I reached and got him by the arm. Neal here had started to make an effort to get up but the other boy had not, and I had to pull him up out of the seat, so I stood them up and made a preliminary frisk, which we usually do to see if they had any weapons on them and I found none. Then I caught him in the belt, his belt and his breeches.

Q. You were in back of him at that time?

A. I was in back of him. Pretty much my whole body was covering him, because he had been told that he was under arrest if he didn't move, but he told me, he said: 'Don't hold me, I'm not going anywhere' and I said: 'Boy that's my privilege, go ahead' so we had gone out a few steps, three, four or five yards, he started pushing back, and he said: 'Take your hands off me, you don't have to hold me' . . . and I kind of tiptoed him and got him out in that position."

On cross examination, this same witness testified (Tr. p. 15, f. 57):

"Q. Tell us again what happened?

A. When I asked him the second time, or at least told him the second time, and I reiterated: 'I'm telling you the second time to getup and come on out of here, because you are under arrest,' this boy sitting on my left, he did make a move in the seat, apparently closing his book and started to

get up but the other boy (later identified as appellant Bouie) never did make any move at all to get up."

And again this witness testified on cross examination (Tr. p. 15, f. 60):

"Q. Tell us again what happened. I'm not really too clear, Chief, as to what you said.

A. I said: 'I'm asking you the second time' and he still didn't make any move and I caught him by the sleeve of the coat and lifted him up out of the seat."

This witness testified that the only physical resistance exhibited by the appellant was the fact that the witness found it necessary to "pick him up out of the seat," (Tr. p. 17, f. 68); that appellant "pushed back later on going out," (Tr. p. 18, f. 69); that in the opinion of the witness, there was no place for appellant to go other than with the arresting officer and that the resistance was the failure of the appellant to immediately move from the seat in the lunch area (Tr. p. 18, ff. 70-71). We think it significant that this arresting officer flatly refused to answer the question when asked on cross examination how much time did he allow for appellant to move as directed before pulling him from the seat for "resisting", and direct the Court's attention to the ruling of the trial Judge (Tr. p. 16, f. 62).

On direct examination, appellant Bouie testified as follows (Tr. p. 51, ff. 201-206):

"Q. When Chief Griffith said 'You are under arrest' what, if anything, did you do?

A. Well, when he said that I was under arrest, I asked him orally why, and physically I began to gather my books.

Q. Did you make any effort to arise?

A. Yes, sir.

Q. At the time you made such an effort, what was Chief Griffith doing?

A. Chief Griffith was standing there, and when I was making an effort to come, to get up to go, he didn't lift me. I know the difference between lifting and snatching. He snatched me from the booth. I had my book in my hand at the time he snatched me. I had my book in my hand, so I gathered my book when he snatched me, very briefly, and he gave me the regular patting down, I don't know what you call it, and following then he grabbed me by the seat of my pants and a gentleman as large as this gentleman, with a fellow my size and very timid,[5] I couldn't have run.* * * I couldn't do anything but go with the gentleman, and the only remark I said to the gentleman, after he pulled me by my belt, I said to him, 'That's all right, Sheriff, I'll come on' because I didn't want to make any scene because I knew the reporters were there and I didn't want anything to even look violent. Those were the only remarks I made to him after he pulled me by my belt.

Q. I'll ask you whether or not you resisted Chief Griffith in any manner?

A. Oh, no, sir.

Q. When he placed you under arrest?

A. No, sir.

Q. I'll ask you whether or not you went along with him voluntarily and without the necessity of the assistance which he gave you?

* Chief Griffith, the arresting officer is above six feet in height and weighs well over two hundred pounds. The appellant Bouie is approximately five feet, six inches tall, and weighs approximately one hundred thirty-five pounds.

A. Repeat that again?

Q. I'll ask you whether or not you went along with Chief Griffith voluntarily?

A. Yes, sir, I went along with him voluntarily.

61 Q. I'll ask you whether or not it was necessary for Chief Griffith to apply force to take you with him?

A. Oh, no, sir, No, sir."

Appellant's testimony on cross examination and redirect examination was as follows (Tr. p. 57, ff. 226-228; p. 58, f. 230):

"Q. In other words, that's when he pulled you up out of the seat?

62 A. Yes, sir.

Q. And he frisked you?

A. Yes, he did.

Q. And he grabbed you by the belt?

A. Yes, sir.

Q. Now, after he grabbed you by the belt, didn't you tell him to take his hands off you?

A. Oh, I didn't tell the Chief that. Definitely not.

63 Q. Didn't you try to push back away from him?

A. Oh, sir, as big as that man is, if you want to go through the procedure and see how difficult it would be, I've never been arrested before, I've never been jerked by my pants as some criminal before. He came and he pulled me by the seat of my pants. Now, normally I couldn't do anything but follow him, he pushed me.

Q. You deny that you tried to get away from 64 him?

A. Yes, sir, I deny that.

Q. Or that you pushed back against him?

A. I deny that.

. . . .

Q. Just answer my question. Did you say that or not?

A. I told him these exact words; I said 'You don't have to hold me. I will come, sir.'

By Mr. Perry:

Q. And having stated your reply to the questions of the City Attorney, that you were prepared to be arrested if need be, state whether or not you were willing to go along with Chief Griffith?

A. Yes, sir."

In addition to the foregoing, the City sought to show throughout this trial that appellants welcomed being arrested and jailed; and appellants admitted that they were perfectly willing to be jailed for their convictions that they have a right to be served in the lunch counter area on an equal basis with others without regard to race or color (Tr. pp. 43-45; ff. 170-176; p. 55, ff. 218). It is submitted that this Court can take judicial notice that the history of the so-called sit-in demonstrations, indeed, of all the protest demonstrations, throughout this country over the last two years proves that the participants are governed by their beliefs in non-violence, passiveness. In the light of this, and the rule that the evidence must be resolved most favorably towards the appellant, it is manifest that appellant Bouie offered no resistance to the arresting officer.

True, resisting lawful arrest is one form of the common law offense of obstructing justice, and the offense is not defined by statute in this State. It may be true that the offense "may be merely passive, for the use

of force is not an essential ingredient of the common law offense" as stated in the majority opinion of this Court in *State v. Hallman*, 102 S. E. (2d) 873, 232 S. C. 489, and that "any obstruction of lawful process, whether it be by active means or by the omission of
69 a legal duty, is an indictable offense," as is stated in the minority opinion of the same case, quoting as authority therefor *State v. Hailey*, 2 Strob. 73. But we view it as significant that all the cases dealing with resisting arrest that we are able to find cite no authority for the said propositions and deal with circumstances of actual obstruction and resistance.

From the circumstances of this case, it is submitted that the appellant Bouie exhibited no conduct at all
70 that can legally be classified as resistance to arrest. He was not even disobedient; at most he failed to move as fast as the arresting officer thought he should. "Resist" * * * is not synonymous with "disobedience"; for, "while resistance embraces the former, it implies much more, and requires an active element of opposition to authority in any connection with the refusal or neglect to obey." *U. S. v. Huff*, 13 F. 630, 639.

We believe that the treatment of Question I adequately disposes of all other issues raised by Ques-
71 tion II.

CONCLUSION

For the reasons herein stated, the judgment of the County Court of Richland County, affirming the judgment of the Columbia Recorder's Court, should be reversed.

Respectfully submitted,

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In The

Supreme Court Of The United States

OCTOBER TERM 1963

No. 9

CHARLES F. BARR, et al., Petitioners,

vs.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, et al., PETITIONERS

vs.

CITY OF COLUMBIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY OF THE CITY OF COLUMBIA TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES

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In The

Supreme Court Of The United States

OCTOBER TERM 1963

No. 9

CHARLES F. BARR, et al., Petitioners,

vs.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, et al., PETITIONERS

vs.

CITY OF COLUMBIA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY OF THE CITY OF COLUMBIA TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES

INTRODUCTION

These two cases arose in the City of Columbia, South Carolina. Their occasion was the arrest, by City Policemen, of the petitioners, then city residents, for violation of established trespass statutes. Those arrested were tried in the Recorder's Court of the City of Columbia, under prosecution by the City Attorney, with defense representation by local attorneys of the City of Columbia. The appeals that

followed through the State Courts were handled and argued by the City Attorney and his assistant, and, in behalf of the petitioners, by their attorneys from the City of Columbia.

The standards of admissible evidence and applicable law applied during the conduct of these trials and their appeals through the state courts were in accordance with then understood constitutional principles and established rules of criminal proceeding. No effort was made, by either side, to venture beyond these boundaries.

Upon this Court's grant of *certiorari*, these cases basically were presented to this Court on the original issues and records together with other cases of similar import from Florida and Maryland. The Solicitor General intervened for reversal in all cases as an Amicus Curiae on the narrow ground first raised here by petitioners. At his conditional request, this Court granted the Solicitor General further leave to file his brief on the broader constitutional question of "state action" offensive to the Fourteenth Amendment.

The Amicus Brief[1] of the United States filed pursuant to this permission goes far beyond both the evidence in these records and the understood principles of constitutional law under which these cases were tried. If this Court should conclude that the principles contained therein are in fact consistent with the requisites of the United States Constitution and its Amendments, then it is respectfully submitted that these cases should be remanded for the introduction of evidence in accordance therewith.

The only real issue which these records present for decision is the narrow question of whether the decisions of the private proprietors were "coerced" by the City of Columbia within the meaning of the rules laid down in *Peterson v. Greenville*, 373 U.S. 244 and *Lombard v. Louisiana*, 373 U.S. 267. The attempt by the Solicitor General to inject before this Court issues involving other cities and states

[1] All further references to Brief, are to that of the Solicitor General, unless otherwise designated.

violates the mandate of the "Case or Controversy" rule of Article III, Section 2 of the Constitution of the United States.

> The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[2]

Where evidence and facts beyond these records were needed in support of the principles advocated by the Solicitor General, there has been substituted references to texts and treatises in a truly gigantic research effort by the Department of Justice.[3] The City of Columbia has neither the human nor the monetary resources to meet this study during the time allotted.

Instead, it is hoped that this Court will consider the constitutional effects and ramifications of the rule advocated by the Solicitor General pointed out herein. There will be no effort to defend other cities of South Carolina or other States of this Union from the accusations made. These cases arose and were prosecuted in the City of Columbia among its citizens. No other city and no state, beyond that of the statutes of South Carolina and the conduct of its Courts, is involved.

There is attached an Appendix of reprinted local news stories about the pertinent developments in the constitutional area of lunch counter and restaurant establishments in Columbia during recent years. Every effort was made to include representative stories. Admittedly this procedure is highly irregular, but if there is to be no opportunity to present competent testimony on the issues raised by the Solicitor General, no other means exist.[4]

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[2] Dissenting Opinion, Mr. Justice Brandeis, *Ashwander v. T.V.A.*, 297 U.S. 288, 347. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 569; *Muskrat v. U. S.*, 219 U.S. 346.

[3] Under prior decisions of this Court, such factual matter, not reflected in these records, should be stricken and disregarded. *Washington Post Co. v. Chaloner*, 250 U.S. 290, 294; *Yellow Poplar Lumber Co. v. Chapman*, 215 U.S. 601; *Board of Commissioners v. W. N. Coler & Co.*, 186 U.S. 46 L. ed. 1260) *Hussman v. Durham*, 165 U.S. 144, 150.

[4] There have been no law review articles or texts written on the subject of the integration of lunch counters or restaurants in the City of Columbia.

QUESTIONS PRESENTED

1. Do these records contain any evidence of "state action" offensive to the Fourteenth Amendment under the established constitutional principles heretofore delineated by this Court?
2. Does the Fourteenth Amendment, solely because of the Prior Actions of the Governments and Agents of the State of Residence, require a different set of property rights for a citizen of the United States?

ARGUMENT

Summary

I.

Under the existing interpretations of this Court, these records contain no evidence of any "state action" offensive to the Fourteenth Amendment. At the time of these cases there were no statutes, ordinances, or official city policies requiring separation of the races in lunch counters in the City of Columbia. The only role of the City police evidenced is that of preserving the peace by preventing the use of individual force.

The decisions of the proprietors to refuse service were purely private, based upon a business judgment of the preferences of the clientele which they deemed most profitable. Similar private business decisions led to the service of all races in the other drugstore departments. In the City of Columbia, other lunch counter proprietors, exercising their private and independent business judgments, have chosen to serve, in some instances, both races, and in others, only members of the Negro Race. Here, petitioners appear for the deliberate purpose of protesting the judgments of these particular owners and provoking these cases.

The prior decisions of this Court have consistently held that where no state owned property was involved and where the agents of the State were not parties to the effective decision to segregate, no prohibited "state action" ex-

isted. In these cases, the private decisions of the owners to refuse petitioners service and require their removal were independently effective and enforceable without the presence or intervention of State agents. Therefore, no prohibited "state action" occurred.

II

Under the Constitutional Rule advocated by the Solicitor General, certain "Slave and Border" States would be prohibited by the Fourteenth Amendment from permitting lunch counter proprietors either to use the private property owner's traditional right of reasonable self help or to call upon the police to evict Negro customers from the private premises. Presumably, the Rule would not obtain in other States and would not apply to the eviction of unwanted clientele of other races. The reason for the Rule is an alleged "conspiracy" between prior governments of those States and certain of their private citizens to foster separation of the races and thereby "brand" the Negro an "inferior caste."

The adoption by this Court of such a Rule as a part of the Constitution of the United States would result in the destruction of the following fundamental principles on which it is grounded:

1. Sovereignty of Statehood. The State would bear the responsibility for the allegedly wrongful past conduct of its governments and agents, thus becoming imperfect and destructible.

2 Equality Among States. The Constitution would require the classification of some States as inferior, thereby depriving their citizens of basic property rights.

3. The Concept of "State Action" under the Fourteenth Amendment. The Fourteenth Amendment would apply to the Sovereign, as distinguished from the agents through which it acts. In lieu of "state action" would be substituted a weighing of "the importance of the elements of State involvement."

4. Justice for the Governed. The Sovereign would punish the governed for past conduct, now ended, which had been approved and condoned by the Sovereign when it occurred.

5. The Function of the Judiciary. In lieu of reasoned Constitutional interpretation, the judiciary would assume the legislative role of decision based upon personal knowledge and opinion grounded on information and facts beyond the scope of the record of any Constitutional Case or Controversy.

The reasons suggested justify no such obliteration of known Constitutional principles. When analyzed, the relationship between the State and the lunch counter is basically no different from that of the private home. The private interest of the proprietor in his clientele is essential to the success of his business. The remedies of the Negro within existing Constitutional boundaries are adequate and have proven successful when employed. There was never any concerted effort to brand him inferior.

These cases present no occasion for this Court to adopt the Rule promulgated by the Solicitor General as a part of the Constitution of this Nation.

I

These Records Present No Evidence of Prohibited "State Action" in the Established Constitutional Sense.

The position of the City of Columbia with respect to the existence of any Constitutional "State Action" has already been set forth in its principal brief filed with this Court, together with the applicable constitutional decisions of this Court. In view of the Solicitor General's brief, there are, however, several points which should be reiterated.

There never has been a statute in South Carolina requiring segregation of the races at private lunch counters or other purely private eating establishments.

There never has been an ordinance of the City of Co-

lumbia requiring or encouraging separation of the races in private lunch counters or restaurants.

There was no policy, official or unofficial, among the Columbia City Council, the Columbia City Manager, the City Police, or other City agents that encouraged or required segregation of the races in private lunch counters or restaurants.[5] If any policy at all existed, it weighed in the other direction. See Appendix pp. 6A, 7A-9A, 12A, 4A-16A.

Nor did the role of the City Police and the subsequent conviction of the petitioners evidence any City or State policy with regard to segregation. Until the argument presented here, it had always been thought that the owner of such establishments had the traditional common law right to use reasonable self help to expel individuals who refused to leave the premises. *State v. Starnes*, 213 S.C. 304, 49 S.E. 2d 209; *State v. Rogers*, 130 S.C. 426, 126 S.E. 329; Appendix p. 14A. This traditional common law right, applicable equally to homes, churches and private clubs (*State v. Bradley*, 126 S.C. 528, 120 S.E. 240), explains the real reason for the existence of criminal trespass law—the permission of a resort to the use of an official police force in lieu of self help. Thus the City Police appeared in these cases pursuant to the basic purpose of all governments since the days of the cave man—the preservation of an orderly society by the Sovereign at the expense of the use of brute individual force or hired assistants.[6] And this is the only interest evident. Whatever else may be said, the

[5] Ordinances of other communities, within or outside of the State of South Carolina, in no way reflect the policy of this City.

[6] Despite argument to the contrary, this interest is vital to the Sovereign.

> Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner *of* treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. *Morissette v. U. S.*, 342 U.S. 246, 256.

City and State in these cases were otherwise actively neutral.[7]

In essence, the Solicitor General recognizes this fact and suggests in lieu of active involvement, State participation through a massive momentum, created by prior state action, which coerced or dictated the decisions of the drug store owner or the preferences of the clientele to which they catered. Br. 91-92.

But if the decisions to refuse petitioners service at the lunch counters were in fact influenced or coerced by "massive" State participation in a prior program of total community segregation from the Negro's "cradle to the grave," Brief p. 62, what is the explanation of the total and complete integration of service to both races, unequivocally evidenced in these records, in all other departments of these large, modern drug stores, including drug departments so close to the core of any home? This fact alone, without any analysis of the subsequent integration of these lunch counter facilities, completely refutes the suggestion that the drug store managers' decisions were the result of State coercion. If any real State (or city) influence to degrade the Negro had in fact existed, it would have appeared in all departments of the stores involved.

In truth, the decisions of these drug store owners were independently theirs. They had invested their savings in the conduct of these lawful businesses. They had made a business judgment, heretofore thought to be lawful, that they could best prosper by serving both races in all departments except the lunch counter.[7a] The latter department they thought would best succeed by catering solely to the

[7] By separating portions of the testimony in *Barr*, it could be made to appear that the police plotted and encouraged petitioners' arrest. The record as a whole is conclusive that such was not the case. Aware of the pending demonstration (possibly informed by Bouie, See Bouie R. 4), where others had recently occurred (Barr R. 23-24), the police arrived in advance. The owner's concern was petitioners' removal, whether or not by arrest. Any assertions to the contrary, the decision that they be removed was the owner's. This is the important decision and the only decision involved here. Could the police have forcibly removed petitioners without arrest? If so, by what authority?

[7a] Consider the reasoning of Mr. Justice Brennan and cases cited in *United States v. Parke Davis & Co.* 362 U.S. 29, 37, 44.

members of the white race. These were private business decisions. *Barr* R. 17-18; 22; *Bouie* R. 24, 26.

There are in Columbia three "racial" types of lunch counters and restaurants. There are those in which the owners have decided, for business reasons, to cater solely to Negroes. *Bouie* R. 60; *Barr* R. 49; There are establishments, like those here were formerly operated, which choose to serve only members of the white race. Finally, there are those which cater to all members of the public, regardless of race.[8] Appendix, p. 4A, 7A. In each instance the owners have made a business decision as to which type clientele they could most profitably serve, based, in most instances upon factors of location, decor, overhead costs and the like, rather than the State "pressures" or even personal preference. See *Bouie* R. 26, *Barr* R. 20.[9]

To state that an owner's choice to serve only one race is designed to discriminate against or prejudice another race is simply not true. Accurately stated, the decision is to separate one race from the other in the particular establishment. In the City of Columbia, the practice is equally operative with respect to eating places for each race—with a third group catering to both. If the suggestion of the Solicitor General is true, is not the proprietor who caters solely to a Negro clientele discriminating against and seeking to prejudice white customers, whose presence is undesired?

Nor do the real facts of these cases present circumstances where an innocent potential customer was denied expected service because of race—these are not the cases of an unxpected "philistine . . . among litterateurs." Br. p. 105. These actions arise out of planned demonstrations, deliberately organized and carefully timed for the purpose

[8] The existence of the first and third type refutes the possiblitiy of any conspiracy among restaurant owners of sufficient magnitude to work a deprivation of equal protection of the laws. *Collins v. Hardyman*, 341 U.S. 651, 661. Compare *Bouie* R. 31.

[9] In spite of argument to the contrary, Br. 104-107, the owner's interest in this decision is as real and vital as is his interest in his profit margin, both because of his concern for the business—not because of any desire to stigmatize a "caste."

of testing the policies of selected eating establishments and provoking official action to create constitutional test cases.[10]

Finally, the Solicitor General suggests that even if the private owners made the *effective* decision to segregate, apart from any State influence, state action still exists if the State's "participation facilitates or encourages discrimination." Br. p. 70. Yet all of the cases relied upon for this proposition, except *Shelley v. Kraemer*, 334 U.S. 1, involve either state owned property, state coercion by statute (or City ordinance) or official pressure, or active participation by public officials in the *effective* decision to segregate. Br. p. 70-72. The real rule for which these cases stand is simply that where state funds are involved, either in the form of property, whether or not under lease to others, or in the form of salaries to public officials, those funds may not participate in any form of segregation. In other words, the Fourteenth Amendment prohibits a state from *permitting* segregation on *its* property or by *its* agents where they are the effective force.[11]

Admittedly, *Shelley v. Kraemer* runs closer, but it does not reach the facts of these cases. In *Shelley*, the neighbors had no lawful right, by individual action, to remove the Negro from his property or to divest him of his legal title. Only the State judiciary could do this and in choosing to do so, the state government made the effective decision requiring the discrimination. Here, as has been shown, the traditional rights of the owner of private property included the right to refuse service, and, if the customer, by remain-

[10] *Bouie* R. pp. 4-5; *Barr* R. p. 30. These records present nothing akin to the circumstances of *Thompson v. Louisville*, 362 U.S. 199.

[11] Subsequent developments in the *Girard Trust* case, upon which the Solicitor General relies, Br. p. 71, confirm this distinction. After this Court's decision in *Pennsylvania v. Board of Trusts*, 353 U.S. 230, the state court removed the City connected trustees and substituted private individuals, none of whom held public office or exercised state or municipal governmental powers. *In Re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 (1958). The following appeal to this Court was dismissed. *Pennsylvania v. Board of Trustees*, 357 U.S. 570, reh. den., 358 U.S. 858. Thus, in the absence of state agents involved in the "effective" decision, their removal by the state court so as to permit segregation was not "state action."

ing, obstructed business, to remove him by individual action. See Appendix p. 14A. The owner's decision to refuse service was therefore, in and of itself alone, *effective*, so far as the segregation was involved. When petitioners then refused to leave, they assumed the roles of obstructionists to the ordinary conduct of the proprietor's business, and he had the right to use reasonable force for their removal. The subsequent intervention of the peace officers, because of this latter right, was entirely neutral, to avoid the use of individual physical force and the possible resulting violence and breach of the peace. Their role is unrelated to and uninvolved in the decision of the owner to segregate.

Thus it is clear that under none of the previous decisions of this Court do these records present any evidence of "state action" in the known Constitutional sense. The Solicitor General apparently recognized this and therefore urges this Court to adopt a novel rule of Constitutional Law.

II

The Fourteenth Amendment Does Not, Solely Because of the Prior Action of the Government or Agents of The State of Residence, Require a Different Set of Property Rights for A Citizen of the United States.

The novel Constitutional Rule of Law promulgated by the Solicitor General of the United States of America as amicus curiae in this Court is basically this:

> The Fourteenth Amendment[12] prohibits the sixteen "Slave and Border States,"[13] because of their prior governments' alleged participation in an attempt to brand the Negro race an "inferior caste" people, from either permitting the operator of a private lunch counter to call upon the police to evict unwanted Negro customers who refuse to leave or from resorting to the

[12] Possibly also the Thirteenth and Fifteenth Amendments. See Br. p. 111.
[13] Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia and West Virginia. See Br. p. 24.

traditional common law rights of property owners to use reasonable force in the removal of such persons from their private property.

It is respectfully submitted that the very statement of such a rule as a part of the Constitutional Law of this Nation is sufficient to explain why it cannot and should not be adopted by this Court. Nevertheless, we would briefly illustrate its ramifications and reasoning.

The reasoning is thus:

The Fourteenth Amendment prohibits a *State* from depriving its citizens of certain rights preserved under federal or state law; the governments of the named States and their citizens for a period in our history maintained Negroes as slaves; after the Civil War and the enactment of the Fourteenth Amendment the governments of these States continued, for a period of time, now ended, but sufficiently recent to be "a 'substantial factor'" Br. p. 91, to foster separation of the White and Negro races; because segregation still exists in some eating places in these States, they may not allow their governments to permit the owners of such businesses to enforce a choice of customers based upon race, by evicting those who refuse to leave through the use of a city police force or by reasonable self help.[14]

The ramifications follow:

In efect, these sixteen "Southern and Border" States are *guilty* members of this federation under the Constitution. Apparently there is nothing they can *now* do to cure this "guilt."[15]

As a result, the owners of those private restaurants in these guilty States which cater solely to the members of the Caucasian race are denied both the traditional right of self control of their private property and the protection

[14] The Solicitor General would still permit the owner to refuse service. Br. 81-83. Apparently the right, derived from the State, to refuse to serve a potential customer is less offensive to the Fourteenth Amendment than the right, from the same source, to require his removal. But see Br. p. 40.

[15] At least one "guilty" State, Maryland, a party to this action, has acted to remove the guilt by enacting a public accommodation law, like 29 other states. Br. p. 31, Fn. 22. Yet it is equally indicted.

of such rights by municipal peace officers. These property owners are denied this right *because of the state in which they live*—as a matter of the Constitutional Law of this Union!

For example, the Fourteenth Amendment would permit the owner of a lunch counter in Massachusetts or Utah or Arizona to operate his lunch counter for the members of the Caucasian race only, if he, or the members of his clientele, so preferred. If any potential customer sought to challenge this operation, the Constitution would permit the owner either to call the official law enforcers to evict that customer or to resort to reasonable self help. Yet if that owner now moved to a "guilty" State and sought to maintain the same business operation, he would be denied by the United States Constitution the traditional rights afforded in "innocent" States, regardless of his independent wishes and the resulting financial effects on his business. Br. pp. 107-108.

In short, for the first time in the history of this Nation, our Constitution would be interpreted as dictating a different set of rights and rules for its citizens, dependent solely upon the State in which they resided and operated their businesses.

Even further—the reasoning of the Solicitor General would draw another Constitutional Line within the "guilty" States. The "guilt" of the States indicted derives from the conspiracy of their earlier governments with private citizens to "brand" the Negro as an "inferior caste" by segregation. Therefore only the owners of those eating establishments catering solely to White clientele are denied the traditional rights. These rights would still be available to the owners of establishments catering only to members of the Negro race. That is to say, the owners of the many exclusively Negro eating establishments in the City of Columbia (*Barr* R. 49, *Bouie* R. 60) can continue to call upon the police to evict members of other unwanted races,

while the Fourteenth Amendment would prohibit the same recourse to their White brethren.

Furthermore, as heretofore indicated, since in most instances the choice of the owner of a lunch counter catering to non-Negroes is dictated by the wishes of his customers, the rule of the Solicitor General would give the owner no choice, in practical effect, other than to suffer financial loss, and possibly that of his business.[16] The Solicitor General's rule affords the owner no method of forcing his regular customers to continue to frequent his establishment if he serves those with whom they do not choose to associate. Therefore, the lunch counter proprietor can either serve Negroes, and lose the profitable trade to which he caters,[17] or he can refuse to serve the unwanted customers and have them deprive him of all business by lining his counters and refusing to leave as a part of demonstrations such as those that precipitated these very cases.

Nowhere in the annals of the Constitutional Law and history of this Nation have we been able to discover any precedent or comparable law for the Constitutional Rule that *certain* citizens of particular States of this Union *must be denied basic rights to operate their businesses*—not because of what those individuals believe—not because of what they individually have done—not because of the current laws or attitudes of their cities or their Sovereign States, which laws or attitudes they could influence—not because of any acts of State officials—BUT SOLELY BECAUSE OF THE CONDUCT OF PAST GOVERNMENTS OF THE STATES IN WHICH THEY LIVE—*WHICH CONDUCT WAS CONSTITUTIONALLY APPROVED WHEN IT OCCURRED.*

Such a rule strikes at the very heart of our Constitutional government! The purpose of the Constitution is to

[16] These effects are termed "hardly consequential." Br. p. 18. See also Br. pp. 108-109.

[17] The opportunity to present evidence to this Court on the economic effect of such integration in some lunch counters would be welcomed.

preserve the existence of the Sovereign States.[18] Until now, these States, as distinguished from their governments and agents, were thought to be perfect and indestructible, like the Union. As explained in *Poindexter v. Greenhow*, 114 U.S. 270, 290-291:

> . . . The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, the perfect representative; but outside of that it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof. . . .
>
> That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. It was upon the ground of this important distinction that this Court proceeded in the case of *Texas v. White*, 7 Wall. 700, when it adjudged that the acts of secession which constituted the Civil War of 1861 were the unlawful acts of usurping state governments, and not the acts of the States themselves, inasmuch as "the Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States"; and that consequently the War itself was not a war between the States, nor a war of the United States against States, but a war of the United States against unlawful and usurping governments, representing not the States, but a rebellion against the United States. . . .[19]

[18] *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548; *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352; *Ashton v. Cameron Co. Water Improvement District No. 1*, 298 U.S. 513; *Carter v. Carter Coal Co.*, 298 U.S. 238.

[19] See also *Thorington v. Smith*, 8 Wall. 1; *Williams v. Bruffy*, 96 U.S. 176; *Horn v. Lockhart*, 17 Wall. 570; *Keith v. Clark*, 97 U.S. 454.

When the agent of the Sovereign uses its power in violation of the Constitution, that agent ceases to represent the State.[20] This must be so. Otherwise, the agent would have the power, by unlawful conduct, to destroy the State and the Union. As explained by this Court in *Texas v. White*, 7 Wall. 700, after reviewing the activities of the Texas secession government:

> The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." When these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?
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> * * * * * *
>
> . . . Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*
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> * * * * * *

[20] *Dorsey v. State Athletic Commission*, 168 F. Supp. 149, affd. 359 U.S. 533; *Orleans Parish School Board v. Bush*, 242 F. 2d 156, cert. den. 354 U.S. 921; *Charlottesville v. Allen*, 240 F. 2d 59. See *Ex Parte Young* 209 U.S. 123.

> Considered, therefore, as transactions under the Constitution, the ordinance of secession adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union and of every citizen of the State, as a citizen of the United States, remains perfect and unimpaired, pp. 724-726. [Emphasis added.]

Yet under the Solicitor General's rule, the Fourteenth Amendment holds sixteen Sovereign States responsible for the prior conduct of their past governments, former agents and officials. If that conduct was wrongful, as here contended, the responsible Sovereign State becomes guilty, imperfect and destructible, and is required to purge itself by denying to its present residents, through its present innocent government, basic and traditional rights of private property. In short, under the guise of the Fourteenth Amendment, the Solicitor General would ignore the distinction between the Sovereign and the government through which it acts, with the result that the Amendment destroys the amended.

> *This distinction is essential to the idea of constitutional government.* To deny it or blot it out obliterates the Line of Demarcation that separates constitutional government from absolutism, free self government, based on the Sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say "L'Etat, C'est moi." *Poindexter v. Greenhow, Supra,* p. 291. [Emphasis added.]

Among the most basic fundamentals of constitutional interpretation is the principle that the Fourteenth Amendment has no application to the Sovereign State, but only

to its government or to its government's agents through whom it acts.

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are: . . . They have reference to the actions of the political body denominated a state, by what other instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of law . . . . This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.
>
> But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power given was to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the state in the denial of the rights which were intended to be secured.[21]

The whole historical concept of "State Action" is based upon this premise. The Sovereign can only act through its governmental agents. It is upon the "actions" and conduct of these governmental agents that the prohibition of the

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[21] *Ex Parte Virginia*, 100 U.S. 339, 346-347. See also *Cooper v. Aaron*, 358 U.S. 1, 15-17; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 90-91; *James v. Bowman*, 190 U.S. 127; *Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226; *Scott v. McNeal*, 154 U.S. 34; *Yick Wo v. Hopkins*, 118 U.S. 356; *Civil Rights Cases*, 109 U.S. 3, 11; *Neal v. Delaware*, 103 U.S. 370, 397. Even Congress has recognized this distinction:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected any citizen of the United States or other within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . 42 U.S.C. 1983 [Emphasis added.] See *Monroe v. Pape*, 365 U.S. 167.

Fourteenth Amendment operates—not the Sovereign State itself, as the Solicitor General contends.

In place of this historic concept would be substituted a weighing of the "importance of the elements of State involvement." Br. pp. 64-70, 79. The measure of the weight is against that of the "involvements of the elements of private action," both against the "fundamental aims of the constitutional guarantee." Br. 79. Yet no standards of what constitute "importance" or real "involvement" or "fundamental aims" is offered. Nor is any "weight" given the interests or rights of the property owners. In short, these cases run afoul of the Fourteenth Amendment *because they do!* If adopted by this Court, the sole effect of such a rule for future cases would be the obliteration of existing guidelines of Constitutional application and the substitution of meaningless phrases. If the almost century old understandings of the Fourteenth Amendment seem difficult of delineation, consider the alternative offered.

> This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. *Peterson v. Greenville*, 373 U.S. 244, 250, Separate Opinion, Mr. Justice Harlan.

Until now there has always been equality among the Sovereign States of this Union. This equality is the very keystone of the Nation. The rule of the Solicitor General would

require discrimination among these members—a classification of certain of these States and the rights of their residents into an inferior constitutional category. This principle is in direct conflict of the understanding of this Court for over 170 years.

> For equality of states means that they are not "less or greater, or different in dignity or power."[22]

> "This Union" was and is a Union of States, equal in power, dignity, and authority, each competent to exert that residiuum of sovereignty not delegated to the United States by the Constitution itself.[23]

> To this we may add that the Constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, *but the Union will not be the Union of the Constitution.*[24]

> There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits.[25]

> Equality of constitutional right and power is the condition of all the States of the Union, old and new.[26]

Surely some of the reasons given in justification of this proposed Constitutional Rule should be subjected to further analysis.

1. *The State's Relation to Lunch Counters.*

It is said that the State has a peculiar relation to lunch counter establishments; that they are really "*public*" in

[22] *United States v. Texas*, 339 U.S. 707, 720. Per Mr. Justice Douglas.
[23] *Coyle v. Smith*, 221 U.S. 559, 567.
[24] *Ibid.*, p. 580. [Emphasis added.]
[25] *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 434.
[26] *Escanaba & L. M. Transportation Co. v. Chicago*, 107 U.S. 678, 689.

nature; that no intimate relationships are there involved; and that therefore it is proper that the State should be required to deny the proprietor certain rights to select his clientele. Br. 28-36, 94-105.

At the outset, it should be clearly remembered that, as the Solicitor General recognizes, lunch counters and restaurants were not historically regulated by the states at common law. Br. 96; 136-138.[27]

Nor are such establishments basically more regulated by State law than the home, private club or law office. The homeowner's legal title to his property is defined and limited, in all the myriad degrees, by State statutes and State common law. Restrictive covenants, city ordinances and codes, and the tort principles of nuisance, all facets of State law, dictate to the homeowner the type of activities, domestic animals and pets that he may maintain and conduct on his premises; the size, design and lot location of his home; minimum safety standards of its construction; the manner of its demolition; electrical wiring requirements; garbage, sanitation, plumbing, sewerage standards; and subject the home to multiple fire prevention restrictions.[28] Like the lunch counter operator, the homeowner pays property taxes on the home and its contents.[29] Nor is the tort liability of the homeowner to visitors substantially differ-

[27] The basic distinction between carriers, turnpikes and inns and lunch counters is manifest. In earlier times the carriers and turnpikes were the only means of transportation and movement, and the inns, as the only places where travelers could stay, were an integral part of the transportation system. Thus these facilities were the subject of the State's interest in freedom of movement. But these lunch counters are unrelated to transportation and are but two of scores of lunch counters in Columbia, many of which are open to Negroes.

See *Williams v. Howard Johnson Restaurant*, 268 F. 2d 845 (4th Cir.); *Davidson v. Chinese Republic Restaurant*, 201 Mich. 389, 167 N.W. 967; *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773; *Noble v. Higgins*, 95 Misc. 328, 158 N.Y.S. 867; *State v. Brown*, 112 Kan. 814, 212 Pac. 663; *Chocos v. Burden*, 74 Ind. App. 242, 128 N.E. 696.

[28] General Code of City of Columbia, 1956; Zoning Ordinance of City of Columbia, 1953; Plumbing Code of City of Columbia, 1955; Fire Prevention Code of City of Columbia, 1960; Building Code of City of Columbia, 1958; Gas Code of City of Columbia, 1954; *Archambault v. Sprouse*, 218 S.C. 500, 63 S.E. 2d 459 (restrictive covenants); *Bowlin v. George*, 239 S.C. 429, 123 S.E. 2d 528 (Nuisance).

[29] Sections 65-1503, 1521, 1611, 1644 of 1952 Code of Laws of South Carolina.

ent from that of a lunch counter proprietor—much less that of a lawyer to clients visiting his office.[30]

Neither are the relationships among visitors on a homeowner's premises materially different from those that exist in a restaurant. The daily contacts of the home with deliverymen, laundrymen, mailmen, repair personnel, garbage collectors, door-to-door salesmen and the like, are at best casual, but it is inconceivable that this fact would deprive the homeowner of the right to require their departure. Yet the home holds out an open invitation to all such persons. Likewise, the intimate relationship between persons dining at a restaurant is closely akin to that of guests in a home—and the continued existence of the restaurant is dependent upon the proprietor's ability to preserve and promote surrounding circumstances which permit this intimate relationship, the most important of such being the other clientele served.

Finally, it is contended that these establishments were "public" by reason of an open invitation to all members of the community. No such open invitation existed. The policies of these proprietors to exclude certain segments of the public from service at the lunch counters were known to all—as if defined by neon signs at the entrance. The records below establish that the very purpose of petitioners' presence was to protest these policies. *Bouie* R. 4-5, 35-37. *Barr* R. 30.

In short, there is nothing distinctive in the relation of these establishments with the State which either justifies or requires such a Constitutional rule, or which could sustain a delineation of such a rule to prevent its application to all forms of private property—including homes, private clubs and churches.

2. *The Negro's remedy when service is refused.*

[30] As to business invitees; *Mullinax v. Great A. & P. Tea Co.*, 221 S.C. 433, 70 S.E. 2d 911.

As to guests; Prosser, Torts, 1955 Ed. 445, 447-450.

As to clients; 65 C.J.S. 519-520.

It is said that the "guilty" States have failed to afford the petitioners a remedy against the proprietor's selection of clientele (Br. 21-64, 73-77), and thus it is proper for the Constitution to deny those States the right to permit the proprietors to enforce that selection.

In the first instance, it is well to define the "right" for which a remedy is needed. To date, there has been no "right," Constitutional or otherwise (unless created by state statute), to maintain one's presence on the private property of another, against the wishes of the owner, absent some ground of general public welfare, health, police power, etc., none of which is revealed in these records.

But even assuming a "right," an adequate remedy is afforded by the States. If in fact the problem is of the magnitude suggested, the right to vote, alone, is sufficient to change the practice complained of by State law, rather than by extending the Constitutional Rule beyond all known bounds.[31] There is no suggestion that this remedy has not been made available.

Even further, the State has afforded the practical remedies of economic boycott, peaceful picketing and demonstration.[32] The news stories reprinted in the appendix furnish a startling example of the effectiveness of these remedies in producing changes in the City of Columbia, just during the short few years they have been employed. The history of these two establishments subsequent to the events giving rise to these cases present further evidence in this regard.[33] Even more so is the support, reflected in these news stories, petitioners are receiving from the official leaders of the City of Columbia. Appendix pp. 14A-17A.

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[31] See, for example, the thirty states having public accommodations statutes. Br. page 31.

[32] These cases arise out of the exercise of this remedy, except that here petitioners exceeded permissible bounds and infringed upon the rights of others.

[33] Neither any longer operates a segregated lunch counter. Eckerd's lunch counter is fully integrated. Taylor Street Pharmacy removed its lunch counter and operates an integrated Venteria.

Thus the State remedies already afforded have, when used, proven adequate to protect the "right" here involved, if one exists. There is no need for this Court to grant constitutional relief by creating for the first time in American history a group of second-class sovereign States.

3. *The Purpose of the Segregation Law.*

The Solicitor General argues that the motives of the States in enacting certain segregation laws were to brand the Negro "inferior" and a lesser member of a "caste." Br. 36, 58-63. Therefore, the argument goes, these States may not now permit private exercise of traditional property rights which would result in any segregation among private individuals.

Unquestionably the purpose of these old statutes was to separate the races in the areas regulated. However, beyond that, the assumption that the Negro was thereby made an inferior caste is that of the Solicitor General.

More likely is the fact that the preference of segregation, reflected in the particular statutes cited, stems from the tremendous and widespread cultural and historical differences in the backgrounds of the two races involved—not from a desire to perpetuate a lesser form of slavery. The very fact that all, or at least a great many more, facets of community life were not regulated by such statutes is overwhelming evidence that the latter motive was not present.[34]

But even if these reasons, and others suggested, could justify the Constitutional classification of a sovereign State of this Union in a separate "guilty" category because of any present day "state action," this is not the argument

[34] See for example, the Black Codes at Br. p. 45-48. These codes following immediately upon the freedom of the slaves were undoubtedly influenced by the motives suggested. But their life was short, and nothing comparable followed.

In any event, the motive of these state legislatures is not for the consideration of this Court:

> "The holding of this Court in *Fletcher v. Peck* (U.S.) 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455." *Tenney v. Brandhove*, 341 U.S. 367, 377.

presented. The indictment is for past conduct, now ended, *at a time when the Constitution, as construed by this Court, the Federal Judiciary System, the Congress of the United States, and its Executive Branch condoned and approved the "state action" now attacked.*

To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts.[35]

[35] *Briggs v. Elliott*, 98 F. Supp. 529, 537 (per Parker, J.) reversed, 347 U.S. 483.

For example:

a. The Supreme Court of the United States

Plessy v. Ferguson, 163 U.S. 537 (Segregated railway cars); *Cumming v. Board of Education*, 175 U.S. 528 (Segregated schools); *Chiles v. Chesapeake & Ohio Ry.*, 218 U.S. 71 (Segregated railroad cars); *Jones v. Jones*, 234 U.S. 615 (Intestate property of a Freedman); *McCabe v. Atchinson, Topeka & S.F. Ry.*, 235 U.S. 151 (Segregated railroad cars); *Corrigan v. Buckley*, 271 U.S. 323 (Race restriction on the sale of property); *Gong Lum v. Rice*, 275 U.S. 78 (Segregated schools); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (Segregated law school).

b. The Federal Judiciary

Gray v. Cincinnati Southern Ry. Co., 11 F. 683 (Segregated carriers); *U. S. v. Buntin*, 10 F. 730 (Segregated schools); *Logwood v. Memphis & C. Ry. Co.*, 23 F. 318 (Segregated railroads); *The Sue*, 22 F. 843 (Segregated steamships); *McQuinn v. Forbes*, 37 F. 639 (Segregated steamship dining facilities); *Stevens v. U. S.*, 146 F. 2d 120 (Inter-racial marriages

Thus, the gist of the argument:

> The United States Constitution now requires certain "guilty" States to deprive their citizens of traditional property rights because of the conduct of prior State governments which, at the time, was approved as lawful by that Constitution.

In short, the Sovereign must punish the guilty for past conduct which the Sovereign *approved and condoned* at the time. There is no comparable rule in American jurisprudence. It offends the spirit of the Fifth Amendment, the Fourteenth Amendment and the purpose of the compact

> to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defense, promote the general Welfare, *and secure the Blessings of Liberty to ourselves and our Posterity* . . .[36]

Finally, it should be noted that the rule suggested carries no definitions nor measurable standards for a reasoned Constitutional Decision as to when, in time, the special Constitutional classification of the sixteen "guilty" States should be removed. While the Solicitor General recognizes the widespread variation in time and degree of the past

prohibited); *Kerr v. Enoch Pratt Free Library of Baltimore*, 149 F. 2d 212 (Employment of certain races refused).

c. The Congress

18 Stat. Part 2, Sec. 281-3, 310, 314 (1874) (Segregated schools in the District of Columbia); 60 Stat. 1041 (1944) (Segregation in hospitals constructed with Federal aid); 26 Stat. 417 (1890) (Segregation permitted in Agricultural & Mechanical colleges receiving Federal aid); 13 Stat. 389 (Special pension provisions for widows of Negro soldiers); 13 Stat. 11 (Separate military units for Negro volunteers).

d. The Executive Branch

McGhee & Ginger, *The House I Live In*, 46 Cornel Law Q. (1961) 191 (Segregated Federal Housing); Greenberg, *Race Relations and American Law* (1959) 158 (Discrimination in Government Employment—Cabinet Posts & Judicial Appointments).

[36] Preamble, The Constitution of the United States. [Emphases added]. Compare *Calder v. Bull*, 3 Dall. 386; *Webster v. Cooper*, 14 Howard 488; *Cummings v. Missouri*, 71 U.S. 277; *Kring v. Missouri*, 107 U.S. 221; *Jonesboro v. Cario*, 110 U.S. 192; *U.S. v. Brindle*, 110 U.S. 688; *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338. See "The Federalist," No. XLIV, Jan. 25, 1788 (James Madison) as edited in Lodge, *The Federalist*, 279 (1888).

The rule advocated is mindful of the example given by the Solicitor General in his first brief in these cases:

> It is, like 'the ancient laws of Caligula,' 'a trap for the innocent.' Brief for the United States as Amicus Curiae (Nos. 6, 9, 10, 12 and 60, October Term, 1963) p. 26.

conduct complained of among the "guilty" States, he terms these acts sufficiently "recent" and "massive" in all sixteen States to justify the indictment sought. Br. 59-60, 91-92, 103-104. Yet inherent in the proposed rule is the idea that at some future date the Fourteenth Amendment will free the restrictions sought, if the guilty behave. How would any court determine by means of the judicial process when that point had been reached? The only possible means is the resort of the individual judges to their own personal knowledge of beliefs (or to opinions of then current authors of texts and law review articles), a function heretofore reserved to the members of legislative bodies.[37]

In these cases a Constitution is being interpreted. Such a statement is in itself a sufficient explanation why the proposed rule, which flies in the face of known fundamental constitutional principles, should not be adopted.

CONCLUSION

For all courts of Constitutional decision, these are trying years in the realm of human liberties. In contrast with the century past, these decisions are not to be resolved by the military—but instead are brought before the Constitutional Judiciary, each on the outermost limits. In very recent years, these decisions are even more difficult because of the simultaneous and contrasting challenge of the ideal, on the one hand, and the deliberate, if peaceful, provocation and violation of known law and rights, on the other —in every case to test the boundary strength of this Constitutional design.

In a sense, the only comparable era in the history of the Constitutional Judiciary was that following the Civil War when it was faced with preserving of the principles of this Union, the re-establishing of its purposes, and further defining of the rights of its citizens, all in the face of extreme public sentiments. Until now, the boundaries of

[37] *Prentis* v. *A.C.L. Ry.*, 211, U.S. 210; *Barrett* v. *Indiana*, 229 U.S. 26. Carter, *The Ideal & the Actual in the Law*, The American L. Rev. (1890) 765-766.

those constitutional principles, purposes, and definitions have survived. Today, within these limits, the strength of this Union has never been greater nor the Constitutional Judiciary more alert to the protection of the individual liberties of the citizens. These cases present no occasion for the obliteration of those boundaries. In the language of Mr. Chief Justice Marshall:

> . . . [I]t is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.[35]

For the foregoing reasons the judgments of the Supreme Courts of the Sovereign States should be affirmed.

Respectfully submitted,
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[35] *Fletcher v. Peck*, 6 Cranch 87, 137.

NEGROES SIT DOWN TOWN—NO INCIDENTS

July 21, 1960

The Columbia Record

About a dozen young Negroes staged lunch counter demonstrations in Main Street stores yesterday afternoon. Observers at the scene said there were no incidents. Police stood by, but made no arrests.

One lunch counter closed after the Negroes took seats, and two others were roped off and closed before the demonstrators went into the stores.

A smaller group of four Negroes had staged a brief demonstration earlier in the day.

* * * * *

NEGROES TOLD NOT TO BUY YULE PRESENTS

November 19, 1960

The State

COLUMBIA (AP)—A South Carolina official of the National Assn. for the Advancement of Colored People Friday called upon all Negroes for a Christmas boycott on stores which employ segregation practices.

The Rev. I. DeQuincy Newman of Columbia, field secretary of the state chapter of the NAACP, also urged Negroes to practice self-denial by not buying any Christmas presents for themselves.

"It is urgent," said Rev. Newman, "that Negroes use the money saved as a result of 'no Christmas buying' to increase their contributions to the church of their choice, increase their investment in freedom and equality by giving to the NAACP, and to add to their bank savings and to pool their resources with other Negroes to establish business enterprises of their own."

The Negro clergyman said "the drive for no Christmas gift buying is aimed against those retail stores and other business establishments which discriminate against Negroes."

"Refusal of lunch counter service, refusal to accord courtesy titles to adult Negroes, maintenance of segregated rest rooms and water fountains and biased employment practices," Rev. Newman said, "are bold examples of racial discrimination on the part of the vast majority of retail stores, service stations and other places of business."

He said Negroes are called upon to stay away from stores which discriminate against them "in order to retain self pride and human dignity and to resist the pressures of the segregationist."

Rev. Newman urged Negroes to buy items of necessity from their friends and "to seek the support of the total community for an intensified campaign for the dignified use of their purchasing power."

He added that Negroes should refrain from buying luxury items for themselves in order to make the 'no Christmas buying drive' as effective as possible.

Rev. Newman's statement carried at its conclusion the slogan:

"No Christmas gift buying in '60 will help you be free by '63."

* * * * *

NEGRO SIT-INS TO CONTINUE 'INDEFINITELY'

December 16, 1960

By The Associated Press.

The State

Sit-in demonstrations by Negroes will continue here "indefinitely," a spokesman for the group said Thursday.

The comment from David Carter, a divinity student at Benedict College came after Negroes demonstrated at three Columbia variety store lunch counters for the third day in a row.

There were no arrests or incidents and they were not served. Six college-age Negroes were at Woolworth's, three at S & H Kress Co., and four at Silver's for about two hours.

McCrory's, where Negroes had demonstrated Tuesday and Wednesday, closed its lunch counter before the demonstrations began. Merchandise was displayed on the counters and paper bags were placed over the stools.

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250 STAGE SIT-INS AT FIVE STORES

February 17, 1961

The State

An estimated 250 Negro young people, presumably students, staged a 2½ hour demonstration at five Columbia downtown stores Thursday.

There were no incidents.

David Carter of Benedict College, who acted as spokesman for the demonstrators, told The State he expected no incidents as "our group is well disciplined."

Lunch counters were closed in four of the stores—Silvers, S. H. Kress Co., Walgreens and McCrory's.

Woolworth served white persons who sought service. Several did. The Negroes were not served.

City Manager Irving G. McNayr and Police Chief L. J. Campbell were on hand. Each store had a police officer or two inside to oversee the situation. The State Law Enforcement Division had four agents on hand.

However, at most of the stores, the demonstrators attracted little attention.

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5 MORE NEGROES ARRESTED AFTER DEMONSTRATIONS

February 23, 1961

The State

Five more Negroes protesting arrest were jailed by city police yesterday in Columbia's third straight day of anti-segregation demonstrations.

The five arrested tried to pass a "no trespassing" sign at a downtown store.

Nine women and three men set up a two-line picket outside the store, moving up and down. They carried signs.

While the marchers kept it up a dozen took seats at two variety store lunchcounters, but were unserved.

* * * * *

Eight Concerns

LUNCH COUNTERS HERE INTEGRATED

August 24, 1962

The State

Eight Columbia business establishments will today be in their fourth day of integrated lunch counters.

The integration in the stores involved has been brought about with no incident of any nature reported.

The following are the companies where the voluntary plan of integration is in operation:

Woolworth's, Kress', Walgreen's, Eckerd's, Silver's, H. L. Green, W. T. Grant and Rose's.

The integration was brought about as a result of the acceptance of a plan designed for an orderly change.

This plan was agreed to by the stores and a group of Negro leaders, after conferences among store officials, representatives of the municipality, civic leaders not associated with the stores and representatives of the Negroes.

Under the plan, an agreed-upon and limited number of Negro customers would be served for an agreed-upon period as an introduction.

From time to time over the last two years there have been demonstrations by Negroes on Main Street in behalf of integrated lunch counters in the variety and drug stores.

Those who formulated and implemented the plan now in effect said they were actuated by the desire to avoid a repetition of conditions which had been created by sit-ins, parades, picketings and the boycotts of the last two years.

This is the first integration of lunch counters in South Carolina.

Some bus terminal and air line terminal eating places are operated on an integrated basis. Also, the street buses in Columbia are, and the municipally-operated golf course at Charleston.

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YOUTHS PICKET IN PROTEST OF LUNCH COUNTER MIXING

August 29, 1962

The Columbia Record

Two sign-carrying white youths picketed two Columbia stores Tuesday in protest over integrated lunch counters.

Lake High and Eddie Hightower, both students at the University of South Carolina, picketed near Eckerd's Drug Store and the F. W. Woolworth store at the Richland Mall Shopping Center on the outskirts of Columbia.

Their signs bore the inscriptions, "Eckerd's and Woolworth's have mixed Lunch Counters. I am Boycotting," and "Money Spent at Eckerd's And Woolworth's Is Money Spent For Race-Mixing."

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COLLEGE-AGE BOYS PICKET STORES HERE

September 5, 1962

The Columbia Record

Several college-age youths Tuesday picketed several Columbia Main Street stores protesting recent racial integration of the stores' lunch counters. They carried signs for about two hours.

Similar pickets were also seen at Richland Mall and Trenholm Plaza, two shopping centers which have integrated lunch counters.

The picketing is the first on Main Street since the counters were integrated. One picket carried a sign on Main Street saying: "Do You Want Columbia To Become Another Washington, D. C. I Don't."

The picketing is similar to that of two youths last week

at the Richland Mall Shopping Center at Forest Drive, and Beltline Boulevard.

The manager of one of the stores said he did not notice any change in the volume of business for the day, either at the lunch counter or in other departments.

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BATES DENIES ACTIVE PART IN INTEGRATION

September 7, 1962

By The Associated Press

The Columbia Record

Mayor Lester L. Bates has emphatically denied he had an active part in the recent integration of Columbia lunch counters.

"The simplest way to describe this is as a voluntary movement on the part of citizens," the mayor said Thursday.

He said there is no bi-racial committee in the city, nor does the city intend to have one.

Bates' denial was prompted by reports the Columbia integration plan had the endorsement and aid of city officials, including the Chamber of Commerce, business and community leaders and a Negro group.

The mayor declined to comment on whether or not he endorsed the integration effort.

Earlier this week, Charleston Republican Chairman Micah Jenkins said Mayor Bates, store officials and Negro leaders "conspired" to bring about the integration. Jenkins dubbed the integration a "sacrifice to political expediency" by the Democrats.

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ARTICLE ON COLUMBIA MIXING AT LUNCH COUNTERS REPRINTED

The News and Courier (Charleston, S. C.)

EDITOR'S NOTE: The following article, which deals with

the integration of lunch counters in Columbia, was published recently in the *Pittsburgh Courier*.

By John H. McCray

COLUMBIA, S. C.—Sixteen Columbia stores opened lunch counters "to all persons" Tuesday, August 21, joining eight other eating establishments who have for several months offered a non-racial service at eating counters, five of which are of the "stand at counter" category.

Only three stores are in the "pending" category, that is not yet known to be open to all persons. Only one of these, the James L. Tapp Co., is reportedly a "hold-out."

The others, United Cigar and Dodd's Variety store apparently weren't checked out when city and Chamber of Commerce officials worked out the desegregation.

Uniquely, a check by The Courier disclosed that actually white eating places were catching up with Negro cafes and restaurants.

The city's four most popular Negro-operated food places, the Alben, College Inn, Pig Trail Inn and the fashionable Fountain Bleu, all said they'd been serving customers on a non-racial basis for many months and planned continuing this policy.

Thursday, the newly opened-to-all stores were complaining to city officials.

Mayor Lester L. Bates passed on to a ten-man Negro committee which had triggered the desegregation a request from merchants that they be sent Negro customers. None felt they had had enough Negro eaters the first two days.

Negro traders were trying to remedy the situation, but one, Dr. L. Palmer Chappelle, a City Commissioner, pointed out that the rounding-up campaign was "unnatural," pointing out that Negroes normally would be most likely to patronize these counters only when on business in the vicinity.

"Negroes in Columbia—as in most Southern cities—are accustomed to eating at home," he advised.

The Columbia desegregation came two months and one week behind the planned June 15 schedule. The delay is explained by a political campaign and developments facing city and Chamber of Commerce teams who were assigned the project.

For example? A plan to adopt processes of two Georgia and one North Carolina cities, all of which had desegregated, was dropped in favor of another developed from "on the spot" study.

The plan was also deferred in favor of the final method of studying techniques used in several cities over a three state area. The plan finally adopted is akin to what is called the "Raleigh" (N. C.) plan. It is simply one in which adults only patronize desegregated counters the first ten or fifteen days.

The project got underway in May after the Negro committee of business and professional men met with Mayor Bates and won a pledge of cooperation and a promise from City Council.

The committee was non-organizational and as those working from the white side are also, is pledged to a "no credit" for this accomplishment excepting that it is the accomplishment of all citizens of Columbia.

Originally, the committee consisted of eight persons. It has now been enlarged to 10. Its members are:

Dr. J. A. Bacoats, president of Benedict College, the Rev. Maxie S. Gordon, Dr. James M. Hinton, chairman; C. D. "Pete" Ingram, secretary; Willis C. Johnson, John H. McCray, Dr. C. O. Spann; I. P. Stanback, Rev. R. C. Wilson and Dr. Howard E. Wright, president of Allen University.

Following is a list (unofficial) of establishments serving food now desegregated in Columbia all with seats:

UPTOWN: Greyhound Bus Terminal, Kwik shop (both for several months), Woolworth, Kress, Walgreen, Eckerd's, Silvers, H. L. Green, Belk's (being re-installed).

RICHLAND MALL: Eckerd's and Woolworth; TRENHOLM PLAZA: W. T. Grant, Walgreen, Rose's; MIDLAND SHOPPING CENTER: W. T. Grant, Roses, Eckerd's at Five Points and Atlantic Thrift Discount Center on Two Notch Road.

Counters without seats open: McCrory's, Taylor St. Pharmacy, Zayre's, Trailway Bus Station (several months), and Sears Roebuck and Co. Pending are the James L. Tapp Co., United Cigar store and Dodd's Five and Ten (stand up at counter).

Columbia becomes the first South Carolina city to drop counter segregation, two years behind a short-lived city plan of 1960 to make it the "first city in the South" to desegregate.

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HOWARD JOHNSON POLICY HERE REMAINS SAME

December 8, 1962

The State

A choice in serving customers will remain the policy of the Howard Johnson Restaurant in West Columbia, said Mrs. Mary K. Price, manager.

Since she operates the restaurant under franchise agreement, Mrs. Price said, local proprietorship enables her to decide service policy.

The Howard Johnson Restaurant here is one of 359 in the nation run by local proprietors under licensing agreements which do not give the company control over racial policies.

Her statement followed a Howard Johnson company declaration Friday that its policy is to provide "service without discrimination" over the nation. There are 297 company-operated restaurants.

Columbia Racial Picture

MORE OPPORTUNITY OPENED TO NEGROES

September 13, 1963

The State

Governmental Affairs Staff

The admittance of three Negro students to the University of South Carolina on Wednesday marked another chapter in a long and continuing story of integration in the State's Capital City.

Some have resulted from court action, but other moves have been voluntary and include facilities and employment.

There has been increasing employment of qualified Negroes in major industries in the metropolitan area, as well as in retail stores and local government agencies. Negroes are now working as clerks, cashiers, and in so-called white collar jobs in plants and businesses here.

Many retail merchants have eliminated racial signs from restrooms and drinking fountains; lunch counters have been integrated; dressing and fitting rooms have been desegregated in most major retail stores; and policies of addressing all customers by courtesy titles (Mr., Mrs. and Miss) have been effected.

Segregation signs have been removed in city and county government buildings and on restrooms of service stations operated here by major oil companies.

Integrated now are the USO, city buses, restaurant and restroom facilities at the Columbia Airport, bus and railroad stations, the Columbia Art Museum, the Columbia Science Museum and Planetarium and the Richland Technical Education Center.

Political conventions held at The Township Auditorium or in hotels have been integrated for many years as has the Richland County Public Library.

There are Negro members of the City Planning Commission, Decent Literature Committee, Cleaner Columbia Committee, City Board of Health, Urban Rehabilitation

Advisory Board, Girl Scout Advisory Board, and the YWCA Board.

Columbia's City Council meetings are not segregated and the council has formally adopted a policy of non-discrimination in hiring city employes.

Employment by the City of Columbia is on a civil service examination basis. Exclusive of police and fire departments, the city employs 527 persons, 215 of whom are Negroes. That is 51 per cent of the total.

The Richland County sheriff's office has employed two Negro deputies and there are eight Negroes on the city police force, four regular officers and four school crossing guards.

Negro police have been upgraded to automobile patrols and city firemen to engineers. There are nine Negro firemen now employed.

There have been 35 Negro applicants for the police force in 10 years, 11 of them hired; 37 applications for the fire department in the past 10 years, nine now employed. Sixty-six of the 153 employes of the Recreation Department are Negroes, 39 of them in supervisory positions, 24 of 41 employes of the Water Construction Department are Negroes, 10 of them are equipment operators or skilled workers.

Efforts toward de-segregation of other activities in the city are presently underway.

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TWO GROUPS DEMONSTRATE IN COLUMBIA

September 18, 1963

The State

Around 50 sign carrying Negroes Tuesday picketed four Main Street theaters in a quiet demonstration.

Several white youths picketed the marchers at each theater. There were no arrests or incidents. Demonstrations began around 4 p. m. and continued well into the night. Demonstration headquarters is Bethel AME Church.

The National Association for the Advancement of Colored People youth group was divided into sign bearers and those trying to purchase theater tickets—they were turned away. Apparently picketing on their own, the handful of white youths carried prosegregation placards and strolled alongside the Negroes.

Both groups were careful to obey sidewalk ordinances and traffic lights.

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COLUMBIAN SAYS POLICE REFUSED HIM PROTECTION

September 28, 1963

The Columbia Record

A Columbia businessman said today he was "denied police protection" when Negro pickets threatened him and attempted to force their way into his establishment.

"All I want is police protection when I ask for it," said Maurice Bessinger, owner of several eating establishments in Columbia.

Police Chief L. J. Campbell was not available at police headquarters today for comment on the charge.

Bessinger said he asked police officers on four different occasions this week to arrest Negro pickets after they "trespassed on my property and attempted to force their way into my store."

Negroes began picketing Bessinger's recently opened eating establishment in the 1400 block of Main Street Wednesday, he said.

"When I told a group of five or six that I chose not to serve them, one of them told me they would make a little white spot out of me," Bessinger said.

"A policeman standing nearby came over and I told him I wanted them arrested," Bessinger said. "The police officer crossed the street where two of his superiors were observing the picketing," Bessinger said.

"While he was across the street, one of the Negroes

pushed the door into my face while I was standing inside," Bessinger said. "I motioned to the policeman, and after coming over he told me he would have to talk to the captain across the street."

"The policeman never came back," Bessinger said.

Bessinger said another picket told him, "What you've got here, bricks will take care of." Bessinger said he told policemen on four different occasions on Friday that he wanted the pickets arrested for trespassing on his property.

Police were called, "twice Thursday afternoon but they never came," Bessinger said.

"One of the pickets was arrested Friday afternoon after a police officer crossed the street and returned with a superior," Bessinger said.

"I had told all of the pickets they were trespassing and I would have them arrested if they continued to trespass," Bessinger said. "As each one passed in front of my door I asked a policeman to arrest them," he said. Bessinger said the door to the establishment is about eight feet from the sidewalk.

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TWO NEGROES SERVED HERE

October 5, 1963

The State

Two Negroes apparently were served in a Columbia restaurant Friday.

Mrs. Vernita Henderson, 340 Campenella Circle, and the Rev. W. Simmons said they were served in the Downtowner Motel Restaurant about 5 p. m.

The manager of the motel was out of town and unavailable for comment Friday night.

CHARGES AGAINST RESTAURATEUR ARE DISMISSED

October 6, 1963

The State

Charges of disorderly conduct against a Columbia restaurant operator accused of threatening racial demonstrators with a weapon were dismissed Saturday in Recorder's Court.

John Andrew Siokos, 37, operator of Capitol Cafe in the 1200 block of Main Street, was accused on a warrant signed by Rev. J. W. Mungin, 42-1 Saxon Homes, a leader of local Negro demonstrations.

Rev. Mungin said that after he and another Negro, Helen Gossett, entered the cafe Friday and asked for service, Siokos told them he did not serve "blacks" and demanded them to leave the establishment.

Rev. Mungin said that Siokos drew a shotgun from behind the counter and also threatened to use the gun if the Negroes returned.

In dismissing the charge, Judge T. Pou Taylor said that the Constitution grants citizens the right to protect their homes and places of business and to order persons from the premises.

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VOLUNTARY INTEGRATION URGED HERE

December 4, 1963

The State

By Charles Wickenberg
Executive News Editor

A large committee of Columbia businessmen studying race relations agreed Wednesday decisions to integrate should be left to individual firms but urged area hotels, motels and theaters to plan for early voluntary desegregation.

Official sources were silent on the action; but *The State*

learned the meeting voted overwhelmingly for the resolution. The committee of 85 was asked to make the study months ago by the mayor and city council.

Mayor Lester L. Bates said Wednesday night he had no knowledge of the resolution.

Other sources confirmed the meeting and the resolution, but there was no official spokesman for the group of businessmen.

The study presented at the meeting said in part:

"The excellent race relationships existing in this city are a matter of pride and have been achieved by clear thinking and calm attitudes. It is our studied opinion that the solving of desegregation problems is best accomplished through the initiative of local citizens rather than outside directed demonstrations.

"We have noted that outside instigated demonstrations engender distrust and hate which takes its toll on the community. We have noted the step-by-step progress in desegregation in this city and feel that acceptance of these steps has been remarkably free of incident."

The committee study said "more rapid progress in desegregation is now imperative." And it added:

"We recognize that decisions as to desegregation are the prerogatives of the various businesses concerned."

The resolution acknowledged progress by Columbia firms "to diminish discrimination among the races" and noted broader employment opportunities, and desegregation of civic and public areas.

"As a first statement we reiterate our belief that the final judgment must be dictated by the individual business concerned and that it must be a voluntary act," the resolution by the businessmen said.

"We recognize in certain highly competitive enterprises, dependent upon wide public support, that moves to desegregate are facilitated when they are coordinated.

"This is particularly true at this stage in Columbia among motels, hotels and theaters. Representatives of these

particular interests are aware that they are in the critical areas of consideration," the resolution said.

"We cannot be oblivious to the peaceful progress that has been made in Columbia and the potential disunity which may result if we do not move steadily along.

"Therefore, as a group of citizens called together by the Mayor and City Council, we command to the owners and operators of motels, hotels and theaters in the Great Columbia area their prompt adoption of appropriate plans to accelerate the availability of their facilities on a desegregated basis," the resolution concluded.

The vote on the resolution by the nearly 85 persons present was taken by voice and there were only a few scattered negative votes.

Late in the day, a newly-organized segregationist group said it knew of the meeting that "passed a resolution to recommend hotels and motels in the Columbia area to integrate as soon as possible."

"We had a man at that meeting," said Maurice Bessinger, chairman of the National Association for the Preservation of White People. He is a local drive-in restaurant operator.

He said his group would picket "anyone who fosters the integration movement." The NAPWP membership totals 100, he said.

Bessinger said his organization feels such matters "should be left to the best interests of both races."

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THEATER INTEGRATION ANNOUNCED

December 14, 1963

The State

A step toward voluntary desegregation of Columbia's movie theaters was announced Friday by a committee of 85 local businessmen.

The executive committee of the group, which recom-

mended the action last week, issued the following press release Friday.

"As a result of a resolution passed last week by a group of 85 representative white citizens, all indoor theaters yesterday began admitting Negroes as part of a plan of orderly, voluntary desegregation.

"The plan was worked out by the managers of the theaters and an executive committee of the large white group. The plan calls for a limited number of Negro patrons in the immediate future.

"The theaters involved are: Atlantic, Carolina, Five Points, Fox, Palmetto, and Ritz.

"Members of the executive committee said that they were gratified at the cooperative spirit of the theaters in response to the recommendation of the larger group and were confident that the citizens of the community will accept this plan with tolerance and good will."

The committee was called together earlier this year by the Mayor and City Council to study local racial relations.

A study presented to the full committee Wednesday, Dec. 4, along with the resolution which was overwhelmingly adopted at the time said:

"We recognize that decisions as to desegregation are the prerogatives of the various businesses concerned."

"The excellent race relationships existing in this city are a matter of pride and have been achieved by clear thinking and calm attitudes. It is our studied opinion that the solving of desegregation problems is best accomplished through the initiative of local citizens rather than outside directed demonstrations," the report said.

"We cannot be oblivious to the peaceful progress that has been made in Columbia and the potential disunity which may result if we do not move steadily along," the resolution said.

"Therefore as a group of citizens called together by the

Mayor and City Council, we recommend to the owners and operators of motels, hotels and theaters in the Greater Columbia area their prompt adoption of appropriate plans to accelerate availability of their facilities on a desegregated basis," the group said.